

**A Critical Analysis of the Legislative framework regulating Intercountry Adoption
in South Africa and Ghana**

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DEDICATION

To my parents, for all their moral support and unconditional love.

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ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
CC	Constitutional Court
CRC	Convention on the Rights of the Child
DSW	Department of Social Welfare
OPSC	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
UNICEF	United Nations Children's Fund

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CHAPTER ONE

INTRODUCTION

1.1 Introduction and Problem Statement

There are millions of children worldwide without parental care, families and homes.¹ The HIV/AIDS pandemic, civil wars and poverty among other factors have contributed to the population of millions of orphans and destitute children in Africa.² The Convention on the Rights of the Child (CRC)³ provides that ‘a child temporarily or permanently deprived of his or her family environment, or in whose best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance by the State.’⁴ Thus, States Parties have an obligation to provide alternative care for such children in accordance with their national law.⁵ Such care includes ‘foster placement, kafalah of Islamic law, adoption and placement in suitable institutions.’⁶ The CRC also recognizes intercountry adoption as one of the many possible solutions to children deprived of a family environment or parental care.⁷ However, it is only considered as a last resort if the child cannot be cared for in the country of origin.⁸

Historically, the practice of intercountry adoption commenced on a large scale in the aftermath of the Second World War (WWII).⁹ Before that time, adoption was strictly

¹ M Liu ‘International Adoption: An Overview’ (1994) 8 *Temple International Comparative Law Journal* 187, 187.

² T Davel ‘Intercountry adoption from an African perspective’ in J Sloth-Nielsen (ed) *Children’s rights in Africa: A legal perspective (2008)* 257.

³ Adopted by the UN General Assembly on 20 November 1989 and came into force in 1990.

⁴ Article 20 (1) of the CRC.

⁵ Article 20 (2) of the CRC.

⁶ Article 20 (3) of the CRC.

⁷ Article 21 (b) of the CRC.

⁸ Ibid.

⁹ T Mosikatsana ‘Intercountry Adoptions: Is there a need for new provisions in the Child Care Act?’ (2000) *South African Journal on Human Rights* 46, 48 and I Sloan *The law of adoption and surrogate parenting* (1988) 85.

viewed as a national option.¹⁰ Although intercountry adoption is currently a subject of heated debate, it emerged as a 'humanitarian act' to the plight of children orphaned and separated from their families as a result of the war.¹¹ The United States military stationed abroad in Germany and Japan brought awareness of the predicament of children who were left orphaned after WWII.¹² Consequently, public concern for children left without families and orphaned triggered the first wave of intercountry adoption which developed as a solution to rescue children affected by the war.¹³ Similarly, the practice of intercountry adoption emerged in the aftermath of the Korean War (1950-1953) and the Vietnam War (1955-1975) which resulted in many war orphans and abandoned children.¹⁴

Currently, 'intercountry adoption has evolved from a humanitarian act into a widely accepted option for childless parents who wish to create a family.'¹⁵ Consequently, this has resulted in different views between those in favour of the practice and those who view it with a cynical eye.¹⁶ Presently, most children available for intercountry adoption come from the African continent where there is a high population of orphaned and abandoned children.¹⁷

According to the African Child Policy Forum, 'Africa has become the new frontier for intercountry adoption.'¹⁸ The number of children adopted from Africa increased threefold between 2003 and 2010.¹⁹ In 2009, Ethiopia was ranked the second top sending country to the USA, Spain and France.²⁰ It was further ranked the second most

¹⁰ L Hills 'Intercountry Adoption under the Hague Convention: Still an attractive option for homosexuals seeking to adopt?' (1998) 6 *Global Legal Studies Journal* 237, 239.

¹¹ UNICEF 'Intercountry Adoption' (1999) 4 *Innocenti Digest* 1, 2.

¹² E Kapstein 'The Baby Trade' (2003) 82 (6) *Foreign Affairs* 115, 116 and Sloan (n9 above) 85.

¹³ *Ibid.*

¹⁴ S Wallace 'International Adoption: The most logical solution to the disparity between the numbers of orphaned and abandoned children in some countries and families and individuals wishing to adopt in others?' (2003) 3 *Arizona Journal of International and Comparative Law* 689, 692-693.

¹⁵ African Child Policy Forum 'Africa: The New Frontier for Intercountry Adoption' (2012) *African Child Policy Forum* 1, 1.

¹⁶ *Ibid.*

¹⁷ Hills (n10 above) 239.

¹⁸ African Child Policy Forum (n15 above) 6.

¹⁹ *Ibid.*

²⁰ *Ibid.*

sending country in the world in 2010 after China.²¹ France is also said to be the major receiver of adopted children from the Democratic Republic of Congo and Mali.²² Furthermore, it was recorded that between 2000 and 2006, adoptions to the USA from Liberia increased tenfold.²³

African children are increasingly attracting attention from prospective Western adoptive parents.²⁴ The increased attention stems from the media coverage which continues to bring awareness of the plight of orphaned and abandoned children living in Africa.²⁵ In addition, previous top sending countries such as Guatemala, China, Romania, Ukraine and Russia have tightened regulations or completely shut down intercountry adoption.²⁶ Thus, Western prospective adoptive parents have increasingly directed their attention to adopt children from African countries.²⁷

Notwithstanding the increased 'attention that African children are attracting from prospective adoptive parents,' the legislative framework regulating intercountry adoption is inadequate or plagued with loopholes and gaps that fail to adequately protect the best interests of the child in the adoption process.²⁸ This has given rise to abuses in intercountry adoption such as baby selling, child trafficking and other illicit activities.²⁹ For instance, in 2008, the President of Liberia suspended intercountry adoptions following a series of reports of illegal adoptions and established a Commission to conduct a comprehensive evaluation of the laws, practices and policies of intercountry adoption and recommend ways to address the gaps in the laws.³⁰ Again, in February 2008, Togo also suspended intercountry adoptions due to cases of illegal adoptions

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ African Child Policy Forum (n15 above) 6.

²⁵ B Mezmur 'Intercountry Adoption as a measure of last resort in Africa: Advancing the rights of a child rather than a right to a child' (2009) 6 (10) *International Journal on Human Rights* 83, 83.

²⁶ J Isanga 'Surging Intercountry Adoptions in Africa: Paltry domestication of international standards' (2012) 27 *Brigman Young University* 229, 232.

²⁷ Isanga (n26 above) 232-233.

²⁸ African Child Policy Forum (n15 above) vii.

²⁹ B Mezmur 'The Sins of Saviours: Child Trafficking in the context of Intercountry adoption in Africa' (2010) Information Document No. 2 for the attention of the Special Commission of June 2010 on the practical operation of the Hague Convention on 29 May 1993 on the Protection of Children and Co-operation in respect of Intercountry Adoption 1, 4.

³⁰ African Child Policy Forum (n15 above) 5.

including instances where courts issued adoption orders solely on the basis of child abandonment without conducting the required legal and social investigations about the background of the child.³¹ In Chad, following the Zoe's Ark scandal in which workers were arrested trying to illegally transport children from Chad to France, the Government suspended intercountry adoption.³²

According to the United Nations Children's Fund (UNICEF), children in countries where there are no laws regulating intercountry adoption or where the legislative framework is inadequate are at risk of child trafficking and other illicit activities.³³ The lack of a legislative framework regulating intercountry adoption in several Communist countries in the early 1990s such as Albania, Latvia and Poland created a climate that was conducive to child trafficking and other illicit activities which violated the best interests of the child.³⁴ The CRC Committee, which monitors the implementation of the CRC, has also recommended the adoption of legislation for the protection of the best interests of the child in intercountry adoption.³⁵

In 1993, the Hague Convention on Protection and Co-operation in respect of Intercountry Adoption (Hague Convention)³⁶ was adopted 'to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law'³⁷ and 'to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children.'³⁸ Notwithstanding this positive development, it is disappointing to note that

³¹ Ibid.

³² Ibid.

³³ UNICEF (n11 above) 1, 8.

³⁴ Mosikatsana (n9 above) 52-53.

³⁵ For instance, in its remarks concerning Cameroon in 2001, the CRC Committee expressed concern regarding the lack of a 'legislative structure for the protection of the best interests of the child in cases of intercountry adoption.' The Committee also expressed concern regarding the 'the large number of children being sold by their parents' and the 'possible use of intercountry adoption for the purposes of trafficking.' Committee on the Rights of the Child, Report on the 28th Session, Sept 24-Oct 12, at 79, 85 and 86. U.N. Doc. CRC/C/111 (Nov. 28, 2001).

³⁶ Adopted by the Hague Conference on Private International Law on 29 May 1993 and entered into force on 1 May 1995.

³⁷ Article 1 (a) of the Hague Convention.

³⁸ Article 1 (b) of the Hague Convention.

despite being in existence for 20 years, the Hague Convention has only been ratified by 15 African countries.³⁹ Phillips asserts that a possible explanation why a few countries have ratified the Hague Convention could be attributed to the fact that they do not recognize intercountry adoption as an alternative means of care for children deprived of a family environment.⁴⁰ UNICEF has consistently urged Governments to ratify the Hague Convention so as to ensure that children are protected against the risk of trafficking and exploitation.⁴¹

In their recommendations and concluding observations, the CRC Committee and the African Committee of Experts on the Rights and Welfare of the Child, which monitors the implementation of the African Charter on the Rights and Welfare of the Child (ACRWC),⁴² have recommended ratifying the Hague Convention and ensuring that national laws are in conformity with the Hague Convention.⁴³ Phillips contends that ratifying the Hague Convention is vital to prevent illegal adoptions.⁴⁴ There is therefore an urgent need to ratify the Hague Convention and to put in place domestic regulations in conformity with international standards on intercountry adoption.⁴⁵ This would ensure the protection of the best interests of children in intercountry adoption.

1.2 Research Questions

This thesis seeks to answer the following research questions:

- What are the fundamental principles that should underpin the practice of intercountry adoption?

³⁹ African Child Policy Forum (n15 above) iii. These countries are Burkina Faso, Burundi, Cape Verde, Guinea, Kenya, Lesotho, Madagascar, Mali, Mauritius, Rwanda, Senegal, Seychelles, South Africa, Swaziland and Togo. See Hague Conference on Private International Law Status Table, available at http://www.hcch.net/index_en.php?act=conventions.status&cid=69, accessed on 15 August 2013.

⁴⁰ C Phillips *Child-headed households: A feasible way forward, or an infringement of children's right to alternative care* LLD (Leiden University) (2011) 81.

⁴¹ UNICEF Press Centre, 'African Governments urged to adopt Hague Conventions on Children,' available at http://www.unicef.org/media/media_52823.html, accessed on 16 August 2013.

⁴² Adopted by the 26th General Assembly of the Heads of State and Government of the African Union in 1990 and came into force in 1999.

⁴³ See for instance African Committee of Experts on the Rights and Welfare of the Child, Concluding Observations: Tanzania (November 2010) and CRC Committee, Concluding Observations: Namibia (October 2012).

⁴⁴ Phillips (n40 above) 81.

⁴⁵ Isanga (n26 above) 234.

- How can the best interests of the child be protected in intercountry adoption?
- How can intercountry adoption be regulated in a manner that ensures the protection of child rights?
- How do the selected African countries regulate intercountry adoption, if at all they do?
- Are the domestic regulations in conformity with the international standards regulating intercountry adoption?
- What kind of legal reforms, if any, are needed to ensure that children are adequately protected in the adoption process?

1.3 Significance of the Study

Intercountry adoption has the potential to provide children deprived of families with the opportunity to experience family life and grow up in loving homes. However, it also exposes children to problems and risks such as child trafficking. The financial aspects of intercountry adoption create avenues for malpractices and other illicit activities which violate the best interests of the child. Children in countries where there is inadequate legislation regulating intercountry adoption are clearly at risk of abuse and exploitation in the adoption process. For instance, African countries such as South Africa, Ghana, Uganda and Ethiopia have experienced cases of illicit activities such as child trafficking in the context of intercountry adoption.⁴⁶

It is the responsibility of every African Government to protect the fundamental rights of children involved in intercountry adoption. This study is therefore significant in that it will help understand how the practice of intercountry adoption can be regulated in a manner that upholds the best interests of the child and prevents illicit activities.

⁴⁶ Mezmur (n29 above) 4.

Furthermore, it will help understand the fundamental principles that should underpin the practice of intercountry adoption.

The study is also significant in that it will investigate and analyze the existing legal framework in South Africa and Ghana concerning intercountry adoption. As indicated above, South Africa and Ghana are some of the examples of African countries that have experienced cases of illicit activities in the context of intercountry adoption. The laws in these two countries will then be critically assessed with regards to the international and regional standards on intercountry adoption. This study will further analyze and identify the legal gaps in the legal systems regulating intercountry adoption.

By attempting to answer the research questions posed in this study, the study seeks to contribute to the existing literature on children's rights in the area of intercountry adoption from an African perspective. Furthermore, in April 2013, the Government of Ghana announced that it was suspending the processing of intercountry adoption applications pending the review of its adoption laws and procedures.⁴⁷ This study therefore hopes that the conclusions and recommendations will be useful to the selected countries and other African countries that seek to reform their existing laws on intercountry adoption to ensure adequate protection of children's rights in intercountry adoption.

1.4 Research Methodology

To answer all the research questions of this thesis, the methodology employed in this study will be primarily based on a literature review of the primary and secondary sources relevant to the subject of discussion. The primary sources include International and Regional human rights treaties, General Comments, Concluding Observations of the CRC Committee and the African Committee of Experts on the Rights and Welfare of the Child and States Party reports of various African countries under the CRC and the ACRWC. These primary sources will be relied on to the extent that they shed light on

⁴⁷ Ghana to streamline intercountry adoption, available at <http://www.modernghana.com/news/399363/1/ghana-to-streamline-inter-country-adoption.html>, accessed on 27 September 2013 and <http://www.ghanabusinessnews.com/2013/08/03/unicef-data-shows-over-1000-ghanaians-adopted-in-three-years/>, accessed on 27 September 2013.

the safeguards and standards that need to be put in place when children are adopted internationally. Other primary sources include relevant pieces of national legislation, regulations and case law. These will be consulted with a view to assess how the selected African countries regulate intercountry adoption and if the regulations are in conformity with the international standards.

The study also relies heavily on secondary sources including books and academic articles and journals. These will be relied on to the extent that they also provide important information on the topic. In addition, various internet sites have also been consulted for relevant information pertinent to the subject of discussion.

1.5 Literature Review

In recent years, intercountry adoption has become an area of vigorous debate leading to a division between those who support it as an alternative means of care for children deprived of families and those who view it with a jaundiced eye. As a result, most of the literature regarding intercountry adoption has described the reasons for and against the practice.

Kristina Wilken argues that unregulated intercountry adoption ‘can lead to the commodification of children and abusive adoption practices brought about by market behavior.’⁴⁸ Tshepo Mosikatsana concurs with this view arguing that although regulation of intercountry adoption cannot be totally guaranteed to prevent abuses, a ‘sound legal framework is fundamental in establishing child-centred standards in the practice of intercountry adoption.’⁴⁹ Mosikatsana further stipulates that illicit activities and abuses in intercountry adoption procedures are common in countries without adequate legislation and administrative structures.⁵⁰

⁴⁸ K Wilken ‘Controlling improper financial gain in international adoptions’ (1995) 2 *Duke Journal of Gender Law & Policy* 85, 87-88.?

⁴⁹ Mosikatsana (n9 above) 52.

⁵⁰ Ibid.

Margaret Liu argues that intercountry adoption operates for improper financial gain and fails to take into account the best interests of the child.⁵¹ Bridget Hubing concurs with this position arguing that the high demand for children has created rings of entrepreneurs who will find and sell children without any regard for the best interests of the child.⁵² Hubing further asserts that children only become valued for financial gain without focusing on the best interests of the child.⁵³

David Smolin asserts that the intercountry adoption system ‘reduces children to objects which are sold to the highest bidder, thereby providing an incentive for corrupt practices such as kidnapping, baby-buying and trafficking.’⁵⁴

Although Margaret Liu and Bridget Hubing oppose the practice of intercountry adoption, they both argue that intercountry adoption is the best solution for children deprived of families and that it is the most effective solution for millions of children wandering the streets or living in unsanitary conditions.⁵⁵ Furthermore Laura McKinney stipulates that intercountry adoption fulfills a child’s right to grow up in a family environment surrounded by a loving and caring family.⁵⁶

1.6 Limitations of the study and selection of African Legal Systems

This research shall be limited to two selected African countries namely, South Africa and Ghana. These countries have been selected for several reasons. Firstly, both countries have not only ratified the CRC and the ACRWC but they recognize and permit intercountry adoption as an alternative means of care for children deprived of families. As a result, these countries are legally bound to give effect to their treaty obligations under the ratified instruments. South Africa has also gone a step further and is one of the

⁵¹ Liu (n1 above) 194-195.

⁵² B Hubing ‘International child adoptions: Who should decide what is in the best interests of the family’ (2001) 15 *Notre Dame Journal of Law, Ethics & Public Policy* 655, 665.

⁵³ Ibid.

⁵⁴ D Smolin ‘Child laundering: How the Intercountry Adoption system legitimizes and incentivizes the practices of buying, trafficking, kidnapping and stealing children’ (2006) *Wayne Law Review* 113, 116.

⁵⁵ Liu (n1 above) 194 and Hubing (n52 above) 663.

⁵⁶ L McKinney ‘International adoption and the Hague Convention: Does implementation of the Convention protect the best interests of children’ (2006-2007) 6 (2) *Whittier Journal of Child and Family Advocacy* 361, 377.

few examples of African countries that have ratified the Hague Convention and domesticated the same in its domestic laws. This is not the case with Ghana. Thus, the two countries were also selected on the basis of analyzing the legal systems of the Hague Convention and non-Hague Convention contracting states.

Secondly, South Africa together with Ghana are countries in Africa that have high intercountry adoption rates⁵⁷ and have both experienced cases of child trafficking and illicit activities in the context of intercountry adoption.⁵⁸ As a result, the selection of these two countries was premised on the need to analyze their legal systems regulating intercountry adoption and to identify the legal gaps that expose children to system abuses and other illicit activities.

Ghana was also specifically chosen for a number of reasons. In April 2013, the Government of Ghana announced that it suspending the processing of intercountry adoption applications pending the review of its adoption laws and procedures. Finally, the CRC Committee has also raised concerns regarding the lack of adequate mechanisms for intercountry adoption in Ghana and has recommended ratifying the Hague Convention.⁵⁹ The study therefore hopes that the conclusions and recommendations made in this study will be useful to African domestic legal systems that seek to embark on reform of their legislative framework on intercountry adoption. Thus, the overarching aim of this thesis is to provide an ideal and acceptable domestic legal system that would best protect child rights in intercountry adoption.

1.7 Chapter Outline

This chapter has defined the statement of the problem, which is that without effective and adequate regulation of intercountry adoption, the risks of child trafficking and other illicit activities which violate the best interests of the child will continue to increase particularly on the African continent. It has further defined the significance of the study

⁵⁷ Ghana to streamline intercountry adoption, available at <http://www.modernghana.com/news/399363/1/ghana-to-streamline-inter-country-adoption.html>, accessed on 27 September 2013 and <http://www.ghanabusinessnews.com/2013/08/03/unicef-data-shows-over-1000-ghanaiian-children-adopted-in-three-years/>, accessed on 27 September 2013.

⁵⁸ Mezmur (n29 above) 4.

⁵⁹ CRC Committee, Concluding Observations: Ghana (March 2006), paras 42-43.

which consists of contributing to the understanding of how the practice of intercountry adoption can be regulated in a manner that upholds the best interests of the child. The second chapter seeks to provide an understanding of the practice of intercountry adoption. This will be done by focusing on several issues such as the definition of intercountry adoption and the various arguments in favour of and against intercountry adoption. In addition, the chapter seeks to answer why intercountry adoption has gained currency. The third chapter will discuss and analyze the international and regional human rights instruments dealing with intercountry adoption. This is being carried out with a view to investigating the fundamental principles that should underpin the practice of intercountry adoption and how it can be regulated in a manner that affords protection to children. Furthermore, the purpose of this chapter is to enhance an understanding of this study at the domestic level. The fourth chapter will analyze and critique the relevant pieces of legislation and regulations pertinent to the subject of intercountry adoption in South Africa and Ghana against the backdrop of international and regional standards. This will be done with a view to determine whether they provide sufficiently and adequate protection to children involved in intercountry adoption. The fifth chapter will conclude the study.

CHAPTER TWO

UNDERSTANDING INTERCOUNTRY ADOPTION

2.1 Introduction

This chapter provides an understanding of intercountry adoption. It gives meaning to the preceding introductory chapter by briefly defining what is precisely meant by the term intercountry adoption. The chapter will further take us through the reasons why intercountry adoption has gained currency, with a specific focus on supply and demand factors, celebrity factors and the intercountry adoption scandals. Lastly, the chapter will highlight the debate regarding the merits and demerits of intercountry adoption.

2.2 Definition of intercountry adoption

Intercountry adoption is mentioned in the CRC and in the ACRWC but has not been defined in both instruments or in international law generally.⁶⁰ However, the main legal instrument governing intercountry adoption, the Hague Convention, provides in Article 2 that:

- (1) The Convention shall apply where a child habitually resident in one Contracting State ('the State of Origin') has been, is being, or is to be moved to another Contracting State ('the receiving State') either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such as adoption in the receiving State or in the State of origin.
- (2) The Convention covers only adoptions which create a permanent parent-child relationship.

It follows from the above quotation that intercountry adoption involves the placement of a child habitually resident in one state in the permanent care of another person or spouses residing in another state who are not the child's biological parents or guardian.⁶¹ It is a form of adoption in which a couple or an individual become the legal and

⁶⁰ J Couchman 'Intercountry adoption in New Zealand- A Child rights perspective' (1997) 27 *Victoria University of Wellington Law Review* 421, 422.

⁶¹ J Martin 'The Good, The Bad & The Ugly? A new way of looking at the intercountry debate' (2006-2007) 13 *University of California Davis Journal of International Law & Policy* 173, 176.

permanent parents of a child who is a resident of a different state. Intercountry adoption offers a permanent family to a child for whom a suitable family could not be found in the child's country of origin.⁶² Most of the children involved in intercountry adoption come from developing countries and as a result such adoptions have raised issues concerning the appropriateness of transracial placement and the morality of 'exporting' children from poor countries to rich countries.⁶³

The practice of intercountry adoption also involves the transfer of all powers, responsibilities, duties, rights and obligations of the biological parents to the adoptive parents by the operation of the law.⁶⁴ It is a 'legal transplant' involving the total replacement of a child's family with a new family whereby the 'adoptive parents step into the shoes' of the biological parents.⁶⁵ Intercountry adoption is therefore a legal process by which an adoption order is made by an authoritative body placing a child who is a national of a different state in the permanent care of another family residing in another state, which order transfers all powers and responsibilities to the adoptive parents. It entirely ruptures the legal relationship between the child and its biological parents and at the same time gives the 'child the status of a legitimate child of the adopters.'⁶⁶

2.3 Why has intercountry adoption gained currency?

Intercountry adoption has developed from a humanitarian act to save the lives of children affected by war to a means of creating a family for childless families when biological or domestic options are unavailable.⁶⁷ Consequently, it has become a supply and demand driven industry.⁶⁸ There are innumerable reasons why intercountry adoption has gained currency. UNICEF has grouped these factors as supply and demand factors.⁶⁹ Equally topical are the controversial adoptions by celebrities such as Angelina Jolie and

⁶² Preamble of the Hague Convention, para 3.

⁶³ M Richards *Adoption* (1989) 9.

⁶⁴ H K Bevan *Child Law* (1989) 203 and B Stark *International Family Law: An Introduction* (2005) 53.

⁶⁵ A Bainham *Children: The Modern Law* 5ed (2005) 263.

⁶⁶ Martin (n61 above) 176 and DSP Cronje and J Heaton *South African Family Law* 2ed (2004) 268.

⁶⁷ Martin (n61 above) 177.

⁶⁸ UNICEF (n11 above) 3.

⁶⁹ Ibid.

Madonna and the intercountry adoption scandals involving the Zoe's Ark scandal and the Haiti adoption scandal. Phillips has classified these factors as celebrity factors and intercountry adoption scandals.⁷⁰

2.3.1 Supply Factors

According to UNICEF, intercountry adoption has become a supply and demand driven industry.⁷¹ The demand for children in industrialized countries has been satisfied with the supply of children in developing countries where there is a high population of abandoned and orphaned children.⁷² There are several factors affecting the increasing numbers of abandoned and orphaned children in the developing countries.

Poverty and economic hardships are one of the most important factors contributing to the increase in children available for intercountry adoption, particularly in developing countries. It is estimated that between 800 million to 1 billion people live below the international poverty line of \$1 per day.⁷³ Parents living below the international poverty line or who are struggling to take care of their children are often forced to abandon their children out of need or shame.⁷⁴ Consequently, many children are abandoned or left to the streets thereby creating a population of children without families.⁷⁵ For instance, it is estimated that 7 million abandoned children live on the streets in Brazil.⁷⁶

In addition, other factors like armed conflicts and civil wars also contribute to orphan hood in developing countries. Conflicts and civil wars create or exacerbate existing levels of poverty.⁷⁷ This in turn results in the massive migration of people from their country to other safe countries.⁷⁸ In countries characterized by conflicts and civil wars, children are amongst the worst affected. Conflicts and civil wars result in communities

⁷⁰ C Phillips 'Intercountry Adoption controversies and criticisms' available at www.charlottephillips.org.IAYFJM_201307.pdf, accessed on 26 September 2013.

⁷¹ UNICEF (n11 above) 3.

⁷² Ibid.

⁷³ D Smolin 'Intercountry Adoption and poverty: A human rights analysis' (2007) 36 *Capital University Law Review* 413, 413.

⁷⁴ Wallace (n14 above) 689.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ L Portellas *A critical analysis of child trafficking laws and policies in South Africa* unpublished LLM thesis (University of Capetown) (2011) 18.

⁷⁸ Ibid.

and families being broken down or pulled apart, which in turn contributes to the population of homeless children. For instance, the conflict and civil war in Sudan gave birth to an estimated population of 3.5 million children without parental care.⁷⁹

The HIV/AIDS epidemic is also another factor which has given rise to the number of orphans in developing countries. According to Phillips, HIV/AIDS is considered to be the chief contributing factor for orphaned children who are in need of alternative care in Sub-Saharan Africa.⁸⁰ It is estimated that more than 16 million children worldwide below the age of 18 years are AIDS orphans.⁸¹ Out of these children, 14.8 million live in Sub-Saharan Africa.⁸² Over the last decade the percentage of orphaned children due to AIDS increased from 3.5% to 32% and is expected to continue to increase over the years.⁸³ Consequently, this has given rise to the number of orphans affected by the killer disease.⁸⁴

Social and political factors have also contributed to the plight of children left without families.⁸⁵ For example, the One-Child Policy in China and the Chinese culture whereby preference is given to male children results in families abandoning or giving up for adoption millions of first-born female children.⁸⁶

In addition, stringent and restrictive laws on abortion coupled with the minimal use of contraceptives particularly in Africa have also contributed substantially to the increase in the number of children in need of alternative care.⁸⁷ For instance, in Zimbabwe, the Termination of Pregnancy Act No. 29 of 1977 permits abortion under very limited circumstances.⁸⁸ These include where the continuation of the pregnancy poses a serious

⁷⁹ General information on Sudan, available at www.soschildrensvillages.ca/where-we-help/africa/sudan/pages/default.aspx, accessed on 26 September 2013.

⁸⁰ Phillips (n40 above) 107.

⁸¹ UNAIDS 'UNAIDS Report on the global AIDS epidemic' (2010), available at www.unaids.org/documents/20101123globalreportem.pdf, accessed on 28 September 2013.

⁸² Ibid.

⁸³ AIDS orphans in Sub-Saharan Africa: A looming threat to the future generations, available at www.un.org/events/tenstories/06/story.asp?storyID=400, accessed on 30 September 2013.

⁸⁴ Phillips (n40 above) 106.

⁸⁵ Wallace (n14 above) 689.

⁸⁶ Ibid.

⁸⁷ Martin (n61 above) 178.

⁸⁸ Act No. 29 of 1977, Termination of Pregnancy Act of Zimbabwe.

threat to the woman's health,⁸⁹ or if there is a serious risk that the child to be born will be seriously handicapped or suffer from a physical or mental defect⁹⁰ or the foetus is conceived as a result of unlawful intercourse.⁹¹ In addition, the Act has burdensome certification requirements such as the involvement of three medical practitioners to certify that the woman is illegible for adoption.⁹²

The breakdown of traditional mechanisms of support for children has also contributed substantially to the plight of children that have been left orphaned and abandoned.⁹³ Over the years, support by the extended family and the community played a pivotal role in providing alternative care for orphaned children due to HIV/AIDS.⁹⁴ However, the extended family system of support for orphaned children has diminished due to migration to urban areas.⁹⁵ Furthermore, the HIV/AIDS epidemic has obliterated a significant proportion of the adult population resulting in children in need of alternative care.⁹⁶

Finally, the stigmatization of single and unwed motherhood has forced a lot of women to abandon their children out of shame thereby creating a population of children without families.⁹⁷

2.3.2 Demand Factors

Over the years, the number of families or individuals in need of children has increased in industrialized countries such as the United States of America (US) and other Western countries.⁹⁸ For instance, it is estimated that there are more than a million families interested in adopting children in just the US.⁹⁹ Individuals or families may want to

⁸⁹ Section 4 (a) of the Termination of Pregnancy Act of Zimbabwe.

⁹⁰ Section 4 (b) of the Termination of Pregnancy Act of Zimbabwe.

⁹¹ Section 4 (c) of the Termination of Pregnancy Act of Zimbabwe.

⁹² C Ngwenya 'Inscribing abortion as a human rights: Significance of the Protocol on the Rights of Women in Africa' (2010) 32 *Human Rights Quarterly* 783, 836.

⁹³ Martin (n61 above) 178.

⁹⁴ Phillips (n40 above) 105.

⁹⁵ Martin (n61 above) 178.

⁹⁶ Hubing (n52 above) 657.

⁹⁷ Martin (n61 above) 178.

⁹⁸ Hubing (n52 above) 659.

⁹⁹ E Bartholet 'Where do black children belong? The Politics of race matching in adoption' (1991) 139 *University of Pennsylvania Law Review* 1163, 1166.

adopt for several reasons particularly gay and lesbian couples, infertile couples and single persons.¹⁰⁰ According to Hubing, in such circumstances ‘adoption constitutes the major alternative to infertility treatment and infertility ‘by-pass’ arrangements such as donor insemination and surrogacy.’¹⁰¹

However, in the US and other industrialized countries, it has become increasingly difficult to adopt children.¹⁰² Although the demand for children in adoption has continued to rise in developed countries, fertility has diminished.¹⁰³ Consequently, the number of children available for domestic adoption has dwindled.¹⁰⁴

A number of social, political, economic and demographic changes have contributed to the decline in the number of children available for domestic adoption.¹⁰⁵ These include the increased use of birth control and other contraceptives,¹⁰⁶ the legalization of abortion and easy access to abortion services,¹⁰⁷ high infertility rate,¹⁰⁸ the higher workforce participation of women,¹⁰⁹ the delay of child birth to later ages,¹¹⁰ the growing acceptance and destigmatization of single and unwed motherhood coupled with the state support given to single motherhood has led to the reduction in abandonment rates of children.¹¹¹ Consequently, it has motivated Westerners to explore other nations for adoptable children.¹¹² Thus, the demand for children in adoption in developed and industrial countries has been satisfied by the supply of available children for adoption in developing countries.¹¹³

¹⁰⁰ Hubing (n52 above) 659.

¹⁰¹ Ibid.

¹⁰² Wallace (n14 above) 690.

¹⁰³ UNICEF (n11 above) 2.

¹⁰⁴ E Bartholet ‘International Adoption: Propriety, Prospects and Pragmatics’ (1996) 13 *Journal of American Academy of Matrimonial Lawyers* 181, 181.

¹⁰⁵ Ibid.

¹⁰⁶ Wallace (n14 above) 690 and Hubing (n52 above) 181.

¹⁰⁷ Ibid.

¹⁰⁸ Martin (n61 above) 177.

¹⁰⁹ UNICEF (n11 above) 2.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² B Mezmur ‘From Angelina (to Madonna) to Zoe’s Ark: What are the A-Z lessons for inter-country adoptions in Africa?’ (2009) 23 *International Journal of Law, Policy and the Family* 145, 146.

¹¹³ UNICEF (n11 above) 3.

2.3.3 Celebrity Factors

Although intercountry adoption has been around for many years, it made plenty of headlines mostly due to the controversial adoption of children by celebrities. Between the period of 2005-2007, two intercountry adoption cases attracted negative publicity which triggered concerns about the rights of the African child in intercountry adoption.¹¹⁴ These are the Angelina Jolie case in Ethiopia¹¹⁵ and the Madonna case in Malawi.¹¹⁶ The cases are briefly summarized below:-

2.3.3.1 *The Angelina Jolie Case*

In July 2005, it was reported by the media that Angelina Jolie was in the process of adopting a baby girl by the name Zahara from Ethiopia through a private adoption agency.¹¹⁷ The Angelina Jolie case, however, faced a lot of criticism after it was associated with an adoption scandal.¹¹⁸ Although the adoption papers had indicated that the mother of the child, Mentaweb Dawit had died from AIDS, it was later reported by the British newspaper, The Sun, that the baby's mother had been tracked down and had been found to be alive and well.¹¹⁹

2.3.3.2 *The Madonna Case*

The Madonna adoption case in Malawi also raised concerns about the adoption of African children by celebrities. In 2006, the High Court of Malawi granted Madonna and her husband, Guy Ritchie an interim order which authorized them to take custody of a boy named David Banda.¹²⁰ Following the institution of the adoption application, Human rights groups sought an injunction to prevent the adoption proceedings.¹²¹ This was premised on the fact that the Malawian laws on adoption prohibited adoptions by non-citizens.¹²² Notwithstanding the Malawian laws on adoption, the celebrity and her

¹¹⁴ Mezmur (n112 above) 145.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Mezmur (n112 above) 147.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Mezmur (n112 above) 147.

¹²¹ Ibid.

¹²² Ibid.

husband were granted a waiver which allowed them to adopt a child from Malawi.¹²³ In May 2008, the High Court issued an adoption order which allowed Madonna and her husband to adopt the child.¹²⁴

2.3.4 Intercountry adoption scandals

2.3.4.1 *Zoe's Ark scandal case*

In 2001, nine French citizens and seven Spanish citizens were arrested while preparing to flee the country with 103 children to France.¹²⁵ Among the detainees were six members of the French Organization named the Zoe's Ark.¹²⁶ The said members argued that they had intended to save the lives of the children from Sudan's violent Darfur region to France for fostering purposes.¹²⁷

In October 2007, the nine French citizens were charged with abduction and fraud by the Chad authorities.¹²⁸ However, in 2007, three French journalists and four Spanish attendants were released following diplomatic pressure from Paris.¹²⁹ The three remaining Spanish aircrew and the Belgian pilot were also released by the Chad authorities.¹³⁰ In December 2007, the remaining six French citizens were charged with kidnapping and fraud and faced trial in N'Djamena.¹³¹ The six accused were found guilty and sentenced to eight years imprisonment.¹³² However, as a result of a bilateral prisoners exchange agreement between Chad and France, the six accused were extradited to France to serve their sentence but were later granted an official pardon by the Chad President, Idriss Deby.¹³³

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid.

2.3.4.2 The Haiti adoption scandal

A more recent case that raised concerns about intercountry adoption involved the Haiti adoption scandal also referred to as the ‘international adoption bonanza’ in which many children were airlifted from Haiti following the devastating earthquake in 2010 and adopted by foreigners without taking into consideration the required safeguards meant to protect children when they are adopted internationally.¹³⁴ There were several reports that children were adopted without the screening required to make sure that they had not been improperly separated from their families.¹³⁵ In some cases, children were released for adoption without the legal documents verifying that they were orphans.¹³⁶

2.4 Arguments in favour of and against intercountry adoption

2.4.1 Arguments against intercountry adoption

In recent years, intercountry adoption has become a subject of heated controversy, leading to a division between those in favour of the practice and those against it. A vigorous debate over the benefits and the risks associated with intercountry adoption has raged for years among children’s rights and human rights advocates. The opponent’s arguments examined here include: preserving a child’s cultural identity, intercountry adoption as a form of imperialism or colonialism, child trafficking and improper financial gain and the best interests of the child vs self interests of prospective adoptive parents.

2.4.1.1 Preserving a child’s cultural identity

One of the main arguments against intercountry adoption is that it violates a child’s right to a cultural identity.¹³⁷ Opponents of intercountry adoption aver that their position is supported by Article 8 of the CRC which recognizes the importance of a child’s right to preserve his/her cultural identity, nationality and family relations. These opponents

¹³⁴ After Haiti Quake, the chaos of the U.S Adoptions, available at <http://www.nytimes.com/2010/08/04/world/americas/04adoption.html?pagewanted=all&r=0>, accessed on 5 December 2013.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ R Carlson ‘Seeking the better interests of children with a new international law of adoption’ (2010/11) 55 *New York Law School Law Review* 734, 746.

argue that ‘rather than promoting a child’s identity, the practice strips it away and replaces it with a name and identity chosen by the adoptive parents.’¹³⁸ In support of this argument, Woodhouse reiterates that ‘...culture of origin, no matter how hard to define with satisfying logic do[es] matter to children and therefore should matter in adoption law.’¹³⁹ Thus, a child’s right to a cultural identity should be respected at all times unless the best interests of the child require that they be adopted through intercountry adoption.¹⁴⁰

Some opponents maintain that ‘removing a child from its country of birth is so harmful to the child that no benefits of intercountry adoption could outweigh its costs.’¹⁴¹ These opponents argue that “‘irreparable loss” is created when a child is denied its cultural identity’¹⁴² and that ‘lack of cultural, ethnic, or racial identity may continue throughout the adopted child’s life, possibly causing problems during adolescence when children are of a different background than their adopted parents.’¹⁴³ Carlson supports this view adding that children suffer personal harm as a result of being separated from their culture of origin¹⁴⁴ and ‘that even the youngest adoptee-a newborn infant, for example-may suffer psychological harm as a direct result of separation from his or her cultural origin.’¹⁴⁵

2.4.1.2 Intercountry adoption as a form of imperialism or colonialism

Opponents of intercountry adoption and some African states view intercountry adoption as a form of colonialism¹⁴⁶ or ‘modern-day imperialism allowing dominant, developed cultures to strip away a developing country’s most precious resources, its children.’¹⁴⁷ A

¹³⁸ L Olsen ‘Live or let die: Could Intercountry adoption make the difference?’ (2004) *Penn State International Law Review* 483, 490.

¹³⁹ B Woodhouse ‘Are you my mother? Conceptualising children’s identity rights in transracial adoptions’ (1995) 2 *Duke Journal of Gender Law and Policy* 107, 114.

¹⁴⁰ African Child Policy Forum (n15 above) vi.

¹⁴¹ J Hodge ‘The Intercountry Adoption Argument: Variation in Policy & Perspective’ (2005) *University of Tennessee Honors Theses Projects* 1, 6.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ Carlson (n137 above) 746.

¹⁴⁵ *Ibid.*

¹⁴⁶ Hubing (n52 above) 665.

¹⁴⁷ Martin (n61 above) 174.

common reaction of African countries to the practice of intercountry adoption is that ‘first you want our labor and raw materials; now you want our children.’¹⁴⁸

The current practice of intercountry adoption confirms that African countries have a tendency to send children for adoption to countries that were their former colonizers.¹⁴⁹ For example, a number of adoptions from French-speaking African countries go to France and those from Guinea-Bissau go to Spain.¹⁵⁰ In addition, the Zoe’s Ark scandal case which occurred in Chad concerning the arrest of nine French citizens and seven Spanish citizens as they prepared to flee the country with 103 African children to France for adoption purposes. Following the arrest, there were protests by Chadians against the arrested French citizens chanting ‘no to the slave trade, no to child trafficking.’¹⁵¹ As a result, this has led to the labeling of intercountry adoption as ‘a new form of colonialism’ or ‘imperialism.’¹⁵²

2.4.1.3 Child trafficking and improper financial gain

Critics of intercountry adoption also view the practice as a form of child trafficking.¹⁵³ They argue that ‘stripped of all humanitarian justification, intercountry adoption is a commercialized and corrupt system driven by the demand of rich Western adults for children.’¹⁵⁴ These critics insist that ‘children have become “commodities” and “unscrupulous institutions are known to recruit children in order to profit from international adoption and child trafficking.”’¹⁵⁵ Baroness Nicholson, a long standing opponent of intercountry adoption opposes the practice because she claims that it ‘has

¹⁴⁸ Liu (n1 above) 194-195.

¹⁴⁹ African Child Policy Forum (n15 above) 2.

¹⁵⁰ Ibid.

¹⁵¹ African Child Policy Forum (n15 above) 3.

¹⁵² African Child Policy Forum (n15 above) 2.

¹⁵³ D Smolin ‘Intercountry Adoption as child trafficking’ (2004) 39 (2) *Valparaiso University Law Review* 281, 283 and Mezmur (n29 above) 4.

¹⁵⁴ Smolin (n54 above) 116.

¹⁵⁵ Most ‘Orphans’ have a living parent (Nov, 24 2009) BBC News, available at http://news.bbc.co.uk/2/hi/in_depth/8375579.stm, accessed on 15 November 2013.

been hijacked by child traffickers'¹⁵⁶ and that adoptive parents are 'unwittingly supporting crime.'¹⁵⁷

Arguments against intercountry adoption are also based on financial grounds. Critics argue that intercountry adoption operates for improper financial gain and fails to take into account the best interests of the child.¹⁵⁸ In support of this view, Hubing argues that the high demand for children has created rings of entrepreneurs who find and sell children by any means without due regard for the best interests of the child.¹⁵⁹ Hubing further avers that the 'danger is that children become products valued only for financial gain that can be realized from their sale on the international market'¹⁶⁰ to "selfish people who want a little child in their home."¹⁶¹

2.4.1.4 Best interests of the child vs Self interests of prospective adoptive parents

Critics further argue that intercountry adoption satisfies the self-interests of prospective adoptive parents and not the best interests of the child.¹⁶² They base their argument on the fact that 'intercountry adoption has evolved from its roots as a humanitarian act to an option for childless people wishing to create a family.'¹⁶³ This suggests that intercountry adoption does not serve the best interests of the child but the self interests of the adoptive parents.

Smolin also argues that 'everyone understands that prospective adoptive parents are, in crude terms "in it for the baby."¹⁶⁴ In support of this argument, other critics of intercountry adoption make reference to the 'shopping' for an adoptable child by prospective adoptive parents of a child 'that best fits their personal needs.'¹⁶⁵ For

¹⁵⁶ M Hourihane 'Does going West really mean a better life?' (2003) *Tribune (Ireland)*, available at <http://www.tribune.ie/article/2003/jan/05/does-going-west-really-mean-a-better-life/?q=/>, accessed on 15 November 2013.

¹⁵⁷ Ibid.

¹⁵⁸ Liu (n1 above) 194.

¹⁵⁹ Hubing (n52 above) 665.

¹⁶⁰ Ibid.

¹⁶¹ Liu (n1 above) 194.

¹⁶² Isanga (n26 above) 245.

¹⁶³ African Child Policy Forum (n15 above) v.

¹⁶⁴ Smolin (n153 above) 304.

¹⁶⁵ K Hermann 'Reestablishing the Humanitarian approach to adoption: The legal and social change necessary to end the commodification of children' (2010) 44 *Family Law Quarterly* 409, 414.

instance, there are adoption agencies such as the European Adoption Consultants which advertise the ‘the availability of ‘Caucasian and Eurasian children’ on their website¹⁶⁶ and the Aurora International Adoption which offer prospective adoptive parents ‘the unique opportunity to choose a desired child on your own’¹⁶⁷ Critics argue that such advertisements are a clear indication that the practice of intercountry adoption satisfies the self interests of prospective adoptive parents and not the best interests of the child.¹⁶⁸

The adoption of African children by celebrities has also raised concerns as to whether intercountry adoption serves the best interests of the child or it satisfies the self interests of adoptive parents.¹⁶⁹ The adoption of David Banda, a Malawian child by the pop singer, Madonna triggered concerns regarding whether the best interests of David Banda were the overriding factor.¹⁷⁰ In that case, Madonna offered to adopt the Malawian child who had lost his mother soon after his birth.¹⁷¹ His father had taken him to the orphanage because he was too poor to take care of him and was still alive at the time of the adoption.¹⁷² David Banda faced the possibility of living in a country where the majority of the Malawian population survive on less than a \$1 a day.¹⁷³ In the case, the Malawian judges recognized that David Banda’s life expectancy would double from forty years in Malawi to seventy years in Britain as he would be joining the celebrity in her \$15 million home in London.¹⁷⁴ Critics of intercountry adoption have, however questioned whether the decision to grant the adoption order by the Malawian judges was motivated by the best interests of the child.¹⁷⁵ Critics further argue that consideration of the best interests of the child requires that the Court ‘first consider that a father’s love is

¹⁶⁶ Isanga (n26 above) 246.

¹⁶⁷ Ibid.

¹⁶⁸ Hermann (n165 above) 246.

¹⁶⁹ Isanga (n26 above) 243.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Isanga (n26 above) 244.

¹⁷³ Isanga (n26 above) 243.

¹⁷⁴ N Gibbs ‘With her Malawi Adoption, Did Madonna save a life or buy a baby? (Oct. 22, 2006) Time, available at <http://www.time.com/time/world/article/0,8599,1549282,00.html>, accessed on 30 November 2013.

¹⁷⁵ Ibid.

paramount and trumps the prospect of a baby being taken away to be raised in splendor.¹⁷⁶

2.5 Arguments in favour of intercountry adoption

While many critics use the abovementioned arguments to oppose the practice of intercountry adoption, other schools of thought contend that intercountry adoption is a necessary and beneficial practice that should be permitted. Proponents assert that they view the practice of intercountry adoption with a focus on the best interests of the child and the child's right to grow up in a family environment.

2.5.1 The Best interests of the child

Proponents of intercountry adoption view the practice 'as the best solution for children deprived of families.'¹⁷⁷ They argue that in contrast to life on the streets, orphanages and foster care, intercountry adoption provides a child with a 'loving permanent home that is necessary to meet that child's physical and emotional needs.'¹⁷⁸ In support of this argument, Liu argues that intercountry adoption 'saves lives.'¹⁷⁹ She further argues that the best interests of the child entails that every child deserves to grow up in a loving home that provides them with love, security and stability.¹⁸⁰ According to Liu, the effective solution for millions of children deprived of families and homes is intercountry adoption.¹⁸¹ Hubing agrees, taking the position that there are families willing and able to provide love and an adequate standard of living to children without families and the emphasis should be on the best interests of the child whether those needs are met outside the child's country of origin.¹⁸²

¹⁷⁶ Ibid.

¹⁷⁷ Hubing (n52 above) 663.

¹⁷⁸ S Strong 'Children's Rights in Intercountry Adoption: Towards a new goal' (1995) 13 *Boston University International Law Journal* 163, 170.

¹⁷⁹ Liu (n1 above) 193.

¹⁸⁰ Liu (n1 above) 193.

¹⁸¹ Liu (n1 above) 194.

¹⁸² Hubing (n52 above) 663.

2.5.2 The right to a family and not to be institutionalized

Proponents of intercountry adoption also argue that intercountry adoption satisfies a child's right to a family and not to be institutionalized.¹⁸³ Dillon argues that children deserve to be protected from the adverse effects of institutionalization and intercountry adoption achieves that purpose.¹⁸⁴ Dillon maintains that no justification based on national pride or children as national 'resources' should trump a child's right to a family.¹⁸⁵

2.5.3 Preserving a child's cultural identity

Other arguments of proponents are direct responses to claims made by the opponents of intercountry adoption. As indicated above, opponents of intercountry adoption argue that the practice violates a child's right to a cultural identity. Bartholet, an advocate of intercountry adoption, however argues that children that are 'doomed to grow up on the streets or in orphanages cannot be expected to enjoy the right to their cultural heritage in a meaningful way.'¹⁸⁶ She further argues that the possibility for domestic adoption in the countries of origin for such children is limited by extreme levels of poverty and societal attitudes towards domestic adoption.¹⁸⁷ Bartholet also argues that other in-country alternatives such as foster care which allow children to remain in their countries of origin and culture do not exist in most sending and poor countries.¹⁸⁸

Other proponents of intercountry adoption argue that the argument that a child might suffer irreparable harm as a result of separation from his/her culture of origin is more applicable in the case of older children who have developed a linguistic, cultural, religious or ethnic identity.¹⁸⁹

¹⁸³ S Dillon 'Making legal regimes for Intercountry adoption reflect human rights principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption' (2003) 21 *Boston University International Law Journal* 179, 187.

¹⁸⁴ Dillon (n183 above) 200.

¹⁸⁵ Ibid.

¹⁸⁶ E Bartholet 'International Adoption: The Human Rights issues' in M B Goodwin *Baby Markets: Money and the new Politics of creating families* (2010) 94, 98.

¹⁸⁷ Ibid.

¹⁸⁸ Bartholet (n186 above) 99.

¹⁸⁹ Carlson (n137 above) 747.

2.5.4 Improper financial gain and baby buying/selling

Opponents of intercountry adoption as indicated above also argue that the practice is purely motivated by financial grounds and baby buying/selling. Bartholet, however, argues that opponents of intercountry adoption fail to take into account the fact that such payments made are generally legal and accounted for by agencies which are authorized to receive such payments for their services rendered in facilitating the adoption.¹⁹⁰ In addition, Bartholet argues that opponents of intercountry adoption focus entirely on the evils associated with the practice without weighing the evils on each side.¹⁹¹ She argues that such opponents do not take into account the evils associated by failing to place children in homes through intercountry adoption and the good that comes out of placing them in such homes.¹⁹²

Although there are concerns raised by critics against intercountry adoption, the author concurs with the arguments in favour of intercountry adoption. It is the author's view that intercountry adoption has the potential to serve the best interests of children by providing them with the opportunity to experience family life which they would not have done so in their country of origin. Every child has a fundamental right to grow up in a family environment that provides them with stability, security and a loving home. If this can be achieved through placement with a family in another country then this alternative should be considered.

The CRC in its Preamble recognizes the importance of a child to grow up in a family environment. It provides that 'the child for the full and harmonious development of his or her personality should grow up in a family environment, in an atmosphere of happiness, love and understanding.'¹⁹³ Furthermore, Article 7 of the CRC provides that a child shall have the right to know and be cared for by his or her parents¹⁹⁴ and Article 18 recognizes that parents have the primary responsibility for the upbringing of the child.¹⁹⁵ It is therefore submitted that these provisions suggest that every child has a

¹⁹⁰ Bartholet (n186 above) 102.

¹⁹¹ Bartholet (n186 above) 103.

¹⁹² Ibid.

¹⁹³ Preamble of the CRC, para 6.

¹⁹⁴ Article 7 (1) of the CRC.

¹⁹⁵ Article 18 (1) of the CRC.

right to grow up in a loving and caring family environment whether such family is provided by the biological parents or adoptive parents.¹⁹⁶ McKinney rightfully argues that the CRC does not define what constitutes a family or differentiate between a biological and an adoptive family.¹⁹⁷ This suggests that a family could be made up of a child's biological family or adoptive parents. Therefore, intercountry adoption fulfills a child's right to a family.

The child's right to a family is also important for the development and well being of the child.¹⁹⁸ Article 6 of the CRC mandates Member States to 'ensure to the maximum extent possible the survival and development of the child.'¹⁹⁹ The CRC provides other rights that are critical for the development of the child. These include the right to education and health among others. Intercountry adoption therefore provides a solution to children who are deprived of the enjoyment of these rights. It provides a means to realizing and enjoying their rights guaranteed by the CRC, something which they would not be able to do on the streets, in institutions or in orphanages.²⁰⁰

Critics of intercountry adoption argue that the practice exposes children to child trafficking and that it satisfies the self interests of prospective adoptive parents and not the best interests of the child. There is no doubt that child trafficking exists and that intercountry adoption creates a market which allows for illicit activities which violate the best interests of children. However, it is the author's view that intercountry adoption if properly regulated, though of course not sufficient, has the potential to eliminate and deter such illicit activities and to ensure that the adoption is in the best interests of the child.

Critics of intercountry adoption also argue that the practice is a form of imperialism or colonialism. It is the author's view that this is not a strong argument against depriving children of the chance to experience family life. As Isanga rightly points out 'not every prospective adoptive parent is motivated by the idea of depriving African countries of

¹⁹⁶ McKinney (n56 above) 378.

¹⁹⁷ Ibid.

¹⁹⁸ Preamble of the CRC, para 6 and Article 6 (1) of the CRC.

¹⁹⁹ Article 6 (1) of the CRC.

²⁰⁰ McKinney (n56 above) 380.

their best resources- children.’²⁰¹ Intercountry adoption provides assistance to countries that are incapable of looking after their children.²⁰²

Critics also argue that intercountry adoption violates a child’s right to a cultural identity and that it causes irreparable damage to the child. The author concurs with Bartholet’s argument that children who grow up in orphanages and on the streets cannot be expected to enjoy their right to a cultural identity and that the argument is more applicable to older children.

2.6 Conclusion

This chapter has defined the term intercountry adoption. It has been shown that intercountry adoption occurs when a child habitually resident in one state is permanently placed with a parent other than his/her birth parents in another state and parental rights and responsibilities are transferred from the biological parents to the adoptive parents.

The chapter has also highlighted the various reasons why intercountry adoption has gained currency. It has been shown that the increased use of contraceptives and birth control, the legalization of abortion, the higher workforce participation of women, high infertility rate and the growing acceptance of single and unwed motherhood have contributed to the shortage of children in industrialized countries. These demand factors have encouraged Westerners to look to African countries where factors such as poverty, armed conflicts, the HIV/AIDS epidemic, stringent laws on abortion, the stigmatization of single motherhood and the breakdown of traditional mechanisms of support for children have created a population of children without families and in need of alternative care. Equally topical are the intercountry adoption scandals involving celebrities such as Angelina Jolie in Ethiopia and Madonna in Malawi and the intercountry adoption scandals involving the Zoe’s Ark case in Chad and the adoption of children in Haiti.

The chapter also highlighted the arguments in favour of and against intercountry adoption. It has been shown that critics argue that intercountry adoption violates a

²⁰¹ Isanga (n26 above) 249.

²⁰² Ibid.

child's right to a cultural identity and causes irreparable damage to a child due to separation from his/her culture of origin. Advocates of intercountry adoption however argue that children who grow up in orphanages or in institutions cannot be expected to enjoy their cultural identity. Critics also view intercountry adoption as a form of colonialism or imperialism and that it satisfies the self interests of the adoptive parents and not the best interests of the child. Finally, the chapter has also shown that critics view intercountry adoption as a form of child trafficking and that it operates for improper financial gain. On the other hand, proponents of intercountry adoption argue that intercountry adoption is the best solution for children deprived of families and that it fulfills a child's right to grow up in a family environment.

In sum, regardless of where one stands in the intercountry adoption debate, it is undeniable that intercountry adoption is the best solution for children deprived of families. It fulfills a child's right to grow up in a family environment and provides children with the opportunity to enjoy other rights embodied in the CRC which are of paramount importance for the development of the child.

CHAPTER THREE

INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK

3.1 Introduction

The present chapter discusses the international and regional legal framework regulating intercountry adoption, with a specific focus on the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special reference to Foster placement and adoption nationally and internationally (Declaration on Foster Placement and Adoption),²⁰³ the CRC, the ACRWC and the Hague Convention. Although, both SA and Ghana are party to the CRC and ACRWC, SA is one of the few good examples of African countries that have ratified the most comprehensive instrument regulating intercountry adoption, the Hague Convention. This Chapter therefore aims at examining these instruments with a view to determining the fundamental principles and standards that should underpin the practice of intercountry adoption and how the practice can be regulated to protect the best interests of the child. Furthermore, these instruments will be used as yardstick to assess SA and Ghana's compliance with international human rights standards at the domestic level.

The Chapter will also make reference to other sources of international law such as the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OPSC)²⁰⁴ which applies directly to issues regarding the sale, trafficking and abduction of children in the context of adoption. In addition, reference will be made to other provisions embodied in these instruments which have a direct bearing on the practice of intercountry adoption.

However, before examining the instruments on intercountry adoption, the chapter will begin by providing a brief discussion on the right to alternative care for children

²⁰³ Adopted by the UN General Assembly 41/85 of 3 December 1986.

²⁰⁴ Adopted by the UN General Assembly on 25 May 2000 and entered into force on 18 January 2002.

deprived of families as it establishes the foundation for the practice of intercountry adoption.

3.2 Children deprived of their family environment and the right to alternative care

Article 20 of the CRC deals with children who are temporarily or permanently deprived of their family environment due to circumstances such as abandonment or orphan hood, or if the State has determined that they should be removed from their environment for their best interests because of neglect, abuse or exploitation by the parents or guardians.²⁰⁵ Such children are entitled to State provided protection and assistance.²⁰⁶ Although every child is entitled to the enjoyment of the rights embodied in the CRC, children without families have the right to special protection and assistance by the State. This is premised on the fact that children without families are vulnerable to exploitation or abuse due to the loss of parental care to ensure their safety and protection. Thus, States Parties are mandated to provide alternative care for such children in accordance with their national laws.²⁰⁷ According to Article 20 of the CRC, such care includes ‘foster placement, kafalah of Islamic law, adoption or if necessary placement in institutions for the care of children.’²⁰⁸

In light of the abovementioned provision, it is apparent that intercountry adoption is recognized as one of the possible forms of alternative care for children deprived of their family environment. It is therefore left to the discretion of States Parties to determine in accordance with their national laws when intercountry adoption is the best solution for children deprived of families. However, it can be concluded from the wording of Article 20 (3) that the CRC gives preference to alternative care in a family set up and that institutional care should be considered as a last resort ‘if necessary.’²⁰⁹ This is line with the importance the CRC attaches to the ‘family as the fundamental group of society and the natural environment for the growth and well-being of all its members and

²⁰⁵ Article 20 (1) of the CRC.

²⁰⁶ Ibid.

²⁰⁷ Article 20 (2) of the CRC.

²⁰⁸ Article 20 (3) of the CRC.

²⁰⁹ Ibid.

particularly children.’²¹⁰ Furthermore, the CRC recognizes the importance of a child to grow up in a family environment for the ‘full and harmonious development’ of the child’s personality.²¹¹

In considering the possible forms of alternative care, States Parties are mandated to take into account the ‘continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.’²¹² This provision is consonant with the child’s right to know and be cared for by his parents,²¹³ preservation of the child’s cultural identity²¹⁴ and the right of children of minority or indigenous backgrounds to ‘enjoy their culture, to profess and practice their own religion and to use their own language.’²¹⁵ According to Hodgkin and Newell, ‘continuity in a child’s upbringing’ refers to ‘continuity of contact with parents, family and the wider community’ and finding a foster or adoptive family from the same cultural background.²¹⁶ This suggests that in considering possible solutions of alternative care, priority should first be given to the child’s upbringing and the child’s cultural background.

3.3 Intercountry Adoption under the CRC, ACRWC and the Hague Convention

There are three main international instruments that regulate the practice of intercountry adoption. These include the CRC, ACRWC and the Hague Convention. Although not legally binding, the Declaration on Foster Placement and Adoption also contains provisions addressing intercountry adoption. The majority of rules and safeguards embodied in the CRC, ACRWC and the Hague Convention on adoption were drawn from the Declaration on Foster Placement and Adoption.²¹⁷

Directly linked to Article 20 of the CRC is Article 21 which regulates the practice of adoption (both domestic and intercountry). The fact that the CRC expounds on

²¹⁰ Preamble of the CRC, para 5.

²¹¹ Preamble of the CRC, para 6.

²¹² Article 20 (3) of CRC.

²¹³ Article 7 (1) of the CRC.

²¹⁴ Article 8 (1) of the CRC.

²¹⁵ Article 30 of the CRC.

²¹⁶ R Hodgkin and P Newell *Implementation handbook on the Convention on the Rights of the Child* (2002) 289.

²¹⁷ Preamble of the CRC, para 10 and Preamble of the Hague Convention, para 5.

intercountry adoption and not other forms of alternative care indicates the importance attached to the protection of children's rights when they are adopted.²¹⁸ Similarly, at the regional level, Article 24 of the ACRWC deals with intercountry adoption. Although these provisions regulate intercountry adoption, there is no mandatory obligation placed on States Parties to permit intercountry adoption as a possible form of alternative care for children without families. The wording in Article 21 of the CRC which provides that 'States Parties that recognize and/or permit the system of adoption' and Article 24 of the ACRWC which stipulates that 'States Parties which recognize the system of adoption' clearly indicate that there is no obligation placed on States Parties to allow the practice of intercountry adoption. Thus, although States Parties are obligated to provide alternative care for children deprived of families, there is no mandate requiring States to allow adoption (both domestic or intercountry) as an alternative means of care.

Articles 21 and 24 of the CRC and ACRWC respectively therefore establish the rules for adoption for those States that allow the adoption of children. This is premised on the fact that intercountry adoption was a controversial topic for drafters of the CRC.²¹⁹ As a result, the final document contains no mandate requiring States to permit adoption.²²⁰ Furthermore, this approach is in recognition of the fact that countries that fall under Islamic law do not recognize intercountry adoption as an alternative means of care.²²¹ Such countries recognize the practice of kafalah which allows children deprived of families to live in permanent forms of foster care without taking up the family name or acquiring inheritance rights.²²²

Although the Hague Convention is regarded as the comprehensive document regulating intercountry adoption, it refines the principles and norms established in the CRC by adding substantive procedures and safeguards.²²³ The CRC, ACRWC and the Hague

²¹⁸ Phillips (n40 above) 47.

²¹⁹ Olsen (n138 above) 511.

²²⁰ Ibid.

²²¹ Hodgkin and Newell (n216 above) 294.

²²² Ibid.

²²³ Permanent Bureau 'The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention' (2008) 1 *Guide to Good Practice* 1, 22.

Convention address a number of issues pertaining to the practice of intercountry adoption. These are discussed in detail below:-

3.3.1 The best interests of the child principle

One of the most fundamental principles underpinning the practice of intercountry adoption is the best interests of the child principle. Article 21 of the CRC and Article 24 of ACRWC prescribe that in cases of adoption, the best interests of the child should be of paramount consideration and not just ‘a primary consideration’ as provided for in terms of Article 3 of the CRC. A comparable provision can also be found in the Preamble as well as in Article 5 of the Declaration on Foster Placement and Adoption which provides that the best interests of the child should be the paramount consideration in matters relating to the placement of the child. Although the CRC does not define the best interests of the child principle, Article 21 of the CRC ‘establishes that no other interests, whether economic, political, state security or those of the adopters, should take precedence over, or to be considered equal to the child.’²²⁴ This suggests that in the context of adoption, the best interests of the child trumps any other interests and should be given the highest level of consideration.

The Hague Convention also embodies the best interests of the child principle.²²⁵ For instance, Article 4 provides that ‘an adoption should take place if determined by the competent authorities in the State of origin that it is in the best interests of the child.’²²⁶ Similarly, the Hague Convention does not define the principle of the best interests of the child. It is submitted that the lack of a clear definition could be attributed to the fact that the requirements that are necessary to fulfill the best interests of the child differ in each case and should not be exhaustive.²²⁷ However, the Guide to Good Practice on the implementation of the Hague Convention drawn by the Permanent Bureau sheds light

²²⁴ Hodgkin and Newell (n216 above) 295.

²²⁵ For instance Preamble of the Hague Convention, para 4, Articles 1 (a), 4 (b), 16 (d), 21 (1) and 24 of the Hague Convention.

²²⁶ Article 4 (b) of the Hague Convention.

²²⁷ Permanent Bureau (n223 above) 15.

on how the best interests of the child can be protected in intercountry adoption.²²⁸ It identifies three critical areas in protecting the best interests of the child in adoption.

Firstly, one of the measures to protect the best interests of the child and to prevent illicit activities such as child trafficking in adoption is to ensure that a child placed for adoption is ‘genuinely adoptable.’²²⁹ Accordingly, Article 4 (a) of the Hague Convention places an obligation on competent authorities of the State of origin to establish that a child placed for adoption is adoptable.²³⁰ However, it does not define what constitutes an adoptable child thereby leaving it to the discretion of States of origin to determine in accordance with their national laws and procedures. The Guide to Good Practice, however, provides guidance on how States can determine the adoptability of a child. For instance, in the case of abandoned or orphaned children, it provides that an investigation of the child’s background and circumstances should be conducted with attempts being made to locate and reunite the child with his/her family and relatives.²³¹ In the case of a child voluntarily given up for adoption, the competent authorities should establish that the decision was not financially induced.²³² Furthermore, a Central registry should keep a list of adoptable children which should carefully monitor the length of time the child is on the list.²³³

Secondly, the best interests of the child in adoption is protected through collecting and preserving information concerning the child’s background, medical history, origins and family.²³⁴ Articles 9 and 30 of the Hague Convention place a mandatory obligation on Contracting States to collect and preserve any information they have about the child’s origins, including the identity of his/her parents and the medical history and ensuring that the child has access to such information.²³⁵ According to the Guide to Good Practice, the medical history of the child is crucial in that it provides information on the child’s current state of health and is important for detecting any future medical problems

²²⁸ Permanent Bureau (n223 above) 31.

²²⁹ Ibid.

²³⁰ Article 4 (a) of the Hague Convention.

²³¹ Permanent Bureau (n223 above) 82.

²³² Ibid.

²³³ Ibid.

²³⁴ Permanent Bureau (n223 above) 31.

²³⁵ Articles 9 (a) and 30 (1) and (2) of the Hague Convention.

the child could have at a later stage.²³⁶ Furthermore, the child's history is equally important in that it provides a connection to the child's past and is vital for knowledge about the child's origin, culture and identity and maintaining personal connections in case the child returns to the country of origin.²³⁷ Such knowledge is also important for the child's psychological well-being in later life and fulfills the child's right to know his/her parents in accordance with Article 7 of the CRC.²³⁸

Thirdly, the best interests of the child in adoption can also be protected by ensuring that 'matching meets the needs of the child with the qualities of the adoptive families or parents.'²³⁹ Matching refers to the process of assessing the prospective adoptive parents to determine their suitability to adopt a particular child.²⁴⁰ Article 16 (1) of the Hague Convention prescribes the factors that should be taken into account by the Central Authority in the State of Origin in order to determine if a particular child should be placed with a particular prospective adoptive family. According to Article 16, if the Central Authority is satisfied that the child is adoptable, it determines on the basis of the reports pertaining to the child and the prospective adoptive parents (the report relating to the prospective adoptive parents is sent by the Central Authority of the receiving state) if the 'envisaged placement is in the best interests of the child.'²⁴¹ The decision to place the child with a particular adoptive family involves identifying prospective adoptive parents who best meet the needs of the child based on the reports relating to the child and the prospective adoptive parents.²⁴²

The best interests of the child principle has also been interpreted by the CRC Committee in its General Comments. The Committee explained that the best interests of the child should be reflected in legislation and incorporated in all decision making affecting the welfare of the child.²⁴³ Any law that restricts the best interests of the child would be in

²³⁶ Permanent Bureau (n223 above) 31.

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ Permanent Bureau (n223 above) 32.

²⁴¹ Article 16 (1) (d) of the Hague Convention.

²⁴² Permanent Bureau (n223 above) 86.

²⁴³ General Comment No. 5 (34th Session 2003) General Measures of Implementation of the Convention on the Rights of the Child (Articles 4, 42 and 44, para 6).

violation of the CRC. For instance, laws requiring lengthy periods before a child can be adopted.²⁴⁴ The Committee has also explained that the best interests of the child principle should be written in legislation in such a way that it can be invoked before the Courts of law.²⁴⁵ In examining State Reports, the Committee has also expressed concern where the best interests of the child is not adequately given attention and consideration in decisions affecting children.²⁴⁶ The Committee has further recommended that States Parties review their legislation to ensure that the best interests of the child principle is adequately reflected in legislation and given consideration in all decisions affecting children.²⁴⁷

3.3.2 Institutional Structures: Competent Authorities, Central Authorities and Accredited bodies

According to Article 21 (a) of the CRC read with Article 24 (a) of the ACRWC, States Parties that permit the system of adoption should ‘ensure that the adoption is authorized by competent authorities in accordance with the applicable laws and procedures.’ Thus, countries which allow adoption should ensure that the adoption is authorized by competent authorities and that there is adequate legislation regulating both domestic and international adoption. This requirement also corresponds with Article 20 of the Declaration on Foster Placement and Adoption which stipulates that ‘in intercountry adoption, placements should, as a rule, be made through competent authorities or agencies.’²⁴⁸ The Hague Convention also explicitly requires an adoption to take place if it has been authorized by competent authorities in both the State of origin and in the receiving state.²⁴⁹

The importance of this requirement is to ensure that the best interests of the child are upheld throughout the adoption process. Adoptions which are organized by adoption agents or the biological and adoptive parents which are incompetent to do so cannot be

²⁴⁴ Hodgkin and Newell (n216 above) 295.

²⁴⁵ Hodgkin and Newell (n216 above) 39.

²⁴⁶ CRC Committee, State Party Report: Algeria, CRC/C/15/Add. 269, paras 29 and 30.

²⁴⁷ Ibid.

²⁴⁸ Article 20 of the Declaration on Foster Placement and Adoption.

²⁴⁹ Article 4 and 5 of the Hague Convention.

guaranteed to serve the best interests of the child.²⁵⁰ For instance, adoption agencies may be driven by financial interests and not the best interests of the child.²⁵¹ An adoption arranged by the biological parents can also be motivated by economic hardships to give up their child for adoption which may not be in the best interests of the child while an adoption arranged by the adoptive parents may also be seeking to serve their self interests, particularly childless families.²⁵² The involvement of competent authorities in the adoption process is therefore crucial in protecting the best interests of the child.

According to the Guide to Good Practice, one of the measures to protect the best interests of the child and to prevent child trafficking and other illicit activities is to ensure that the proper consents to the adoption are given.²⁵³ Competent authorities also play a pivotal role in the adoption process by ensuring that proper consents to the adoption have been given. Article 21 (a) of the CRC requires competent authorities to ensure that ‘...if required, the persons concerned have given their informed consent to the adoption on the basis of such counseling as may be necessary.’ Although Article 24 (a) of the ACRWC contains a similar provision, it makes ‘appropriate counseling’ mandatory when consent to the adoption is necessary.

Similarly, the Hague Convention requires consent to be obtained from ‘the persons, institutions and authorities whose consent is necessary for adoption.’²⁵⁴ Prior to giving their consent, the competent authority should ensure that the person consenting to the adoption has been counseled and understands the effect of their consent,²⁵⁵ that the consents were freely given in the required legal form in writing²⁵⁶ and not induced by payment or compensation²⁵⁷ and that the consent of the mother is only given after the birth of the child.²⁵⁸ The requirement for the mother’s consent to be given after the birth

²⁵⁰ Phillips (n40 above) 49.

²⁵¹ Phillips (n40 above) 50.

²⁵² Phillips (n40 above) 49-50.

²⁵³ Permanent Bureau (n223 above) 34.

²⁵⁴ Article 4 (c) (1) of the Hague Convention.

²⁵⁵ Ibid.

²⁵⁶ Article 4 (c) (2) of the Hague Convention.

²⁵⁷ Article 4 (c) (3) of the Hague Convention.

²⁵⁸ Article 4 (c) (4) of the Hague Convention.

of the child serves to ensure that the mother is not motivated by stress or anxiety to give up her child for adoption.²⁵⁹

Furthermore, in accordance with the general principle of the right of the child to be heard under Article 12 of the CRC, the Hague Convention attaches importance to the views of the child in the adoption process. It requires the competent authorities to ensure that depending on the age and maturity of the child,²⁶⁰ the child's consent has been obtained after been counseled and informed of the effects of their decision,²⁶¹ that the consent has not been induced by payment or compensation²⁶² and that it has been expressed in writing in the required legal form.²⁶³ The recognition of children's participation rights signifies the evolution of the status of children as passive recipients to active agents in decisions affecting them.²⁶⁴ The CRC Committee has emphasized that when a child is to be given up for adoption, it is important that the child is heard in the adoption process.²⁶⁵ The CRC Committee has also stressed that in decisions of adoption, the 'best interests of the child' cannot be determined without taking into consideration the child's views.²⁶⁶

One of the measures put in place by the Hague Convention to prevent child trafficking is to provide protection to families.²⁶⁷ Families and children need protection from exploitation.²⁶⁸ Accordingly, the Hague Convention puts in place protective measures to prevent inducement of birth families to give up their child for adoption.²⁶⁹ In order to minimize the opportunities for financial inducements, the Hague Convention establishes the 'no contact rule' which explicitly prohibits any 'contact between the prospective

²⁵⁹ C Nicholson 'The Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption' in C J Davel (ed) *Introduction to Child Law in South Africa* (2000) 249.

²⁶⁰ Article 4 (d) of the Hague Convention.

²⁶¹ Article 4 (d) (1) of the Hague Convention.

²⁶² Article 4 (d) (4) of the Hague Convention.

²⁶³ Article 4 (d) (3) of the Hague Convention.

²⁶⁴ G Lansdown 'The realisation of children's participation rights: Critical reflections' in B Percy Smith & N Thomas (eds) *A handbook of children and young people's participation perspective from theory and practice* (Taylor and Francis e-library 2010) 11.

²⁶⁵ General Comment No. 12 (51st Session 2009) The right of the child to be heard, para 55.

²⁶⁶ General Comment No. 12 (n265 above) para 56.

²⁶⁷ Permanent Bureau (n223 above) 32.

²⁶⁸ Ibid.

²⁶⁹ Ibid.

adoptive parents and the child's parents or any other person who has care of the child' until the required consents have been obtained.²⁷⁰ This is due to the vulnerability of parents living in abject poverty to pressures from wealthy adopters.²⁷¹ Contact is only allowed in adoptions that take 'place within a family or if the contact is in compliance with the conditions established by the competent authority of the State of origin.'²⁷² The importance of obtaining free and informed consent is therefore a necessary inroad to protect children from being wrongfully removed from their parents.

In order to afford further protection to families and children from exploitation, the OPSC prohibits improperly inducing consent and mandates States Parties to criminalize any improper inducement of consent for the purposes of adoption of a child in violation of the applicable international instruments on adoption.²⁷³

3.3.2.1 Central Authorities

Another important mechanism of the Hague Convention in the protection of the best interests of the child and the elimination of various abuses which have plagued the intercountry adoption system is the requirement to establish a Central authority. Even States that are not Contracting States to the Hague Convention, a Central Authority is a crucial body in the adoption process.²⁷⁴ Article 6 of the Hague Convention mandates Contracting states to appoint a Central Authority to carry out the duties prescribed by the Convention.²⁷⁵ These include co-operating with each other to protect children,²⁷⁶ exchange of information²⁷⁷ and keeping each informed.²⁷⁸ In addition, Central Authorities are mandated to take appropriate measures to ensure that an adoption does

²⁷⁰ Article 29 of the Hague Convention.

²⁷¹ W Duncan 'Intercountry Adoption: Some issues in implementing and supplementing the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption' in J Doek et al *Children on the move: How to implement their family life* (1996) 75.

²⁷² Article 29 of the Hague Convention.

²⁷³ Article 3 (1) and 3 (1) (a) (ii) of the OPSC.

²⁷⁴ For instance the CRC Committee in its recommendation to the DRC, recommended that the Government establish a Central Authority to regulate the system of adoption despite the fact that it was not party to the Hague Convention: CRC Committee, Concluding Observation: Democratic Republic of Congo (2009), para 48 (d) and African Child Policy Forum (n15 above) 34.

²⁷⁵ Article 6 of the Hague Convention.

²⁷⁶ Article 7 (1) of the Hague Convention.

²⁷⁷ Article 7 (1) (a) of the Hague Convention.

²⁷⁸ Article 7 (2) (b) of the Hague Convention.

not result in financial gain,²⁷⁹ to collect, preserve and exchange information concerning the situation of the child and the prospective adoptive parents²⁸⁰ and to facilitate and expedite the adoption process.²⁸¹ Furthermore, applications for intercountry adoption are also made to the Central Authority in each contracting state.²⁸²

The Central Authority in the receiving state should also ensure that the prospective adoptive parents are eligible to adopt²⁸³ while the Central Authority in the state of origin is responsible for ensuring that the child is adoptable,²⁸⁴ ensuring that the necessary consents have been obtained in accordance with Article 4²⁸⁵ and that placement is in the best interests of the child.²⁸⁶ Furthermore, where an adoption has to take place after the child has been transferred to the receiving State and the Central Authority of the receiving state is of the view that the continued placement of the child with the prospective adoptive parents is not in the best interests of the child, it shall take the necessary measures to protect the child.²⁸⁷ Such measures include withdrawing the child from the prospective adoptive parents and arranging temporary care,²⁸⁸ arranging without delay new placement for the child in consultation with the Central Authority of the State of origin,²⁸⁹

The Central Authority therefore acts as ‘a gatekeeper, with all adoptions in and out of the country channeled through its checks.’²⁹⁰ The system of co-operation and co-ordination between the Central Authorities in both the sending and receiving states is a powerful tool to eliminate practices which violate the best interests of the child. Furthermore, the involvement of a legally established body in the adoption process is a

²⁷⁹ Article 8 of the Hague Convention.

²⁸⁰ Article 9 (a) of the Hague Convention.

²⁸¹ Article 9 (b) of the Hague Convention.

²⁸² Article 14 of the Hague Convention.

²⁸³ Article 15 (1) of the Hague Convention.

²⁸⁴ Article 16 (1) of the Hague Convention.

²⁸⁵ Article 16 (1) (c) of the Hague Convention.

²⁸⁶ Article 16 (1) (d) of the Hague Convention.

²⁸⁷ Article 21 (1) of the Hague Convention.

²⁸⁸ Article 21 (1) (a) of the Hague Convention.

²⁸⁹ Article 21 (1) (b) of the Hague Convention.

²⁹⁰ P Hayes ‘The Legality and Ethics of Independent Intercountry Adoption under the Hague Convention’ (2011) 25 *International Journal of Law, Policy and Family* 288, 289.

necessary inroad to curtail and eliminate private adoptions where there is a high risk of violations of the best interests of children.²⁹¹

3.3.2.2 Accredited bodies

According to the Guide to Good Practice, the accreditation of bodies is one of the safeguards of the Hague Convention intended to protect children from illicit activities.²⁹² Accredited bodies can also perform the functions of the Central Authorities set out in Articles 14-21 of the Hague Convention. These functions relate to the procedural requirements involved in intercountry adoption. However, not all functions of the Central Authority can be performed or delegated to accredited bodies.²⁹³

In order to ensure that accredited bodies uphold the best interests of the child in intercountry adoption, the Hague Convention puts in place standards that should be met by accredited bodies. These include demonstrating competence to discharge properly the functions assigned to them,²⁹⁴ pursuing non-profit objectives,²⁹⁵ be directed and staffed by persons qualified by training or experience or ethical standards to work in the field of intercountry adoption,²⁹⁶ be subject to supervision by competent authorities regarding their composition, operation and financial institution²⁹⁷ and the directors, administrators and employees should not receive unreasonably high remuneration in relation to services rendered.²⁹⁸ The involvement of legally accredited bodies in the adoption process is a positive development in preventing system abuses and eliminating illegal adoptions.

²⁹¹ African Child Policy Forum (n15 above) 35.

²⁹² Permanent Bureau (n223 above) 54.

²⁹³ See for example Articles 7, 8 and 33 of the Hague Convention.

²⁹⁴ Article 10 of the Hague Convention.

²⁹⁵ Article 11 (a) of the Hague Convention.

²⁹⁶ Article 11 (b) of the Hague Convention.

²⁹⁷ Article 11 (c) of the Hague Convention.

²⁹⁸ Article 32 (3) of the Hague Convention.

3.3.3 The subsidiarity principle

Another fundamental principle that should underpin the practice of intercountry adoption is the subsidiarity principle. The principle of subsidiarity is highlighted in Article 21 (b) of the CRC which prescribes that ‘inter-country adoption may be considered as an alternative means of child’s care if the child cannot be placed in a foster or in an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin.’ Article 24 (b) of the ACRWC uses similar wording but explicitly emphasizes that intercountry adoption should be considered as ‘the last resort.’ A comparable provision can also be found in the Preamble of the Hague Convention²⁹⁹ and in Article 4 (b) which provides that ‘an adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child’s best interests.’

The CRC Committee concurs with the abovementioned position stating that ‘intercountry adoption should be considered, in the light of Article 21, namely as a measure of last resort.’³⁰⁰ The CRC Committee has also reiterated that ‘priority must be given to adoption by relatives in their country of residence. Where this is not an option, preference will be given to adoption within the community from which the child came, or at least within his or her own culture.’³⁰¹ In order to ensure that intercountry adoption takes place in the best interests of the child, States should first implement the subsidiarity principle by considering national solutions.

The subsidiarity principle therefore suggests that efforts should be made to ensure that a child is cared for by his/her birth family or extended family.³⁰² If that is not attainable, other possible forms of permanent family care in the child’s country of origin should be

²⁹⁹ Preamble of the Hague Convention, para 3.

³⁰⁰ See for instance CRC Committee: Concluding Observations Brazil (November 2004) UN Doc. CRC/C/15/Add.241, para 47 and African Child Policy Forum (n15 above) 25.

³⁰¹ General Comment No. 6 (39th Session 2005) Treatment of Unaccompanied and Separated children outside their country of origin, para 25.

³⁰² Permanent Bureau (n223 above) 29.

given consideration.³⁰³ It is only after ‘due consideration has been given to national solutions’ that intercountry adoption should be considered if it is in the best interests of the child.³⁰⁴ Intercountry adoption fulfills the best interests of the child if it provides a child in need of a home with a loving and permanent family.³⁰⁵

UNICEF has also shed light on the hierarchy of alternative care options to be prioritized for children deprived of a family environment. This hierarchy of options is intended to protect the best interests of children in need of alternative care.³⁰⁶ According to UNICEF, the following hierarchy of options should be considered:

- Family-based solutions (return to the birth family, foster care and adoption) should generally be preferred to institutional placement;
- Permanent solutions (return to the birth family and adoption) should be preferred to temporary ones (institutional placement and foster care);
- National (domestic) solutions (return to birth family, foster care and national adoption) should be preferred to international ones (intercountry adoption).³⁰⁷

In light of the foregoing, it is apparent that intercountry adoption satisfies the first two principles while foster placement satisfies the first and last principles.³⁰⁸ On the other hand, institutional placement can be said to fulfill the last principle as it does not offer a family-based or permanent solution. Thus, according to UNICEF’s hierarchy of options, intercountry adoption should be considered subsidiary to other possible solutions that fulfill all three guiding principles such as domestic adoption³⁰⁹ or the birth family of the child.

Although importance is attached to the subsidiarity principle, it is the author’s view that the best interests of the child should be the overriding principle in all matters affecting the welfare of the child. Thus, the subsidiarity principle should always be interpreted in

³⁰³ Ibid.

³⁰⁴ Ibid.

³⁰⁵ Ibid.

³⁰⁶ UNICEF (n11 above) 5.

³⁰⁷ Ibid.

³⁰⁸ Mezmur (n25 above) 92.

³⁰⁹ Mezmur (n25 above) 91-92.

the context of the best interests of the child principle.³¹⁰ For instance, while preference is given to national adoption or other forms of permanent family care in the child's country of origin, if there are no suitable domestic adoptive families available, it would not be in the best interests of children to keep them waiting and languishing in institutions when a permanent family placement is available abroad.³¹¹ Thus, the principle of subsidiarity is not the ultimate overriding principle in intercountry adoption but the best interests of the child.³¹²

3.3.4 Safeguards and standards equivalent to those existing in national adoption and the principle of non-discrimination

In accordance with the general principle of non-discrimination embodied in Article 2 of the CRC, Article 21 (c) of the CRC read with Article 24 (c) of the ACRWC obligates States Parties to 'ensure that the child concerned by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption.' Similarly, Article 20 of the Declaration on Foster Placement and Adoption prescribes that 'in intercountry adoption, placements should, as a rule, be made through competent authorities or agencies with application of safeguards and standards equivalent to those existing in respect of national adoption.'³¹³ This provision is of significant importance in that it seeks to afford the same standards of protection to children involved in both national and intercountry adoption.³¹⁴ Thus, intercountry adoptions should be authorized by competent authorities who determine that the adoption is in the best interests of the child on the basis of proper investigation, information and with proper consents.³¹⁵

Furthermore, in accordance with Article 26 (2) of the Hague Convention where an adoption has the effect of terminating an existing parent-child relationship, the child affected by the adoption shall be entitled to the enjoyment of the rights equivalent to those resulting from an adoption made under the national law in the receiving state. In this context, the principle of non-discrimination serves to ensure 'equivalent rights and

³¹⁰ Davel (n2 above) 263.

³¹¹ Permanent Bureau (n223 above) 29.

³¹² Permanent Bureau (n223 above) 30.

³¹³ Article 20 of the Declaration on Foster Placement and Adoption.

³¹⁴ Permanent Bureau (n223 above) 30.

³¹⁵ Hodgkin and Newell (n216 above) 299.

protections for all adopted children.’³¹⁶ It also seeks to afford protection to disadvantaged children such as children with disabilities and to ensure that they also enjoy the right to grow up in a family environment through intercountry placement as their non-disabled counterparts.³¹⁷

3.3.5 Improper financial gain

Although intercountry adoption has the potential to provide children deprived of families with loving homes and security, it also poses significant risks and problems for children involved in intercountry adoption. The financial aspects involved in intercountry adoption such as fees, the costs for services rendered, donations to institutions and gifts can encourage illicit activities and system abuses including the trafficking of children. Because of the large sums of money involved, children and the prospective adoptive parents are particularly at risk of being exploited by those ‘facilitating’ the process for improper financial gain.³¹⁸ Hodgkin and Newell assert that although payments may be made in good faith by prospective adoptive parents and without causing harm to the adopted child, ‘a system that puts a price on a child’s head is likely to encourage criminality, corruption and exploitation.’³¹⁹ Such illicit activities involved in intercountry adoption have the potential to violate the best interests of children.

The CRC and ACRWC recognize the problems intercountry adoption poses for the best interests of the child if it is not properly regulated.³²⁰ Accordingly, States Parties are mandated to ‘take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it.’³²¹ The ACRWC, however, explicitly mentions ‘trafficking’ by providing that States Parties shall ‘take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in trafficking or improper financial gain for those who try to

³¹⁶ Permanent Bureau (n223 above) 31.

³¹⁷ Permanent Bureau (n223 above) 31 and Olsen (n138 above) 510.

³¹⁸ Save the Children ‘International Adoption’ (2010) *Policy Brief* 1, 2.

³¹⁹ Hodgkin and Newell (n217 above) 299.

³²⁰ Mezmur (n29 above) 5.

³²¹ Article 21 (d) of the CRC.

adopt a child.’³²² Similarly, Article 20 of the Declaration on Foster Placement and Adoption prohibits any placement that results in improper financial gain for those involved in it. Some schools of thought have rightfully criticized the CRC for failing to define what constitutes an ‘improper financial gain’ arguing that the provision implies that ‘proper’ financial gain in the context of intercountry adoption is permissible.³²³ In addition, scholars argue that the lack of a clear definition has the potential to open doors to trafficking in children.³²⁴

A comparable but more elaborate provision is found in the Hague Convention. Article 8 of the Hague Convention obligates Central Authorities to take ‘appropriate measures to prevent improper financial gain or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention.’³²⁵ The Hague Convention goes a step further explicitly prohibiting anyone from deriving improper financial gain or other gain related to intercountry adoption³²⁶ and limiting payments made to costs, expenses and reasonable professional fees.³²⁷ It also prohibits ‘directors, administrators and employees of bodies involved in an adoption’ from receiving unreasonably high remuneration for services rendered.³²⁸ Control and regulation of the financial aspects of the adoption process by Central Authorities is therefore of paramount importance in combating the sale of and trafficking in children and protecting the child’s best interests in adoption.³²⁹ According to the Guide to Good Practice, the best protection against system abuses and exploitation of children is to ensure that there is transparency.³³⁰ Laws, policies, regulations and fees regulating intercountry adoption ‘should be clearly defined and communicated to users of the system.’³³¹ Transparency in the adoption system is therefore crucial in the fight against malpractices.

³²² Article 24 (d) of the ACRWC.

³²³ S Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 353.

³²⁴ *Ibid.*

³²⁵ Article 8 of the Hague Convention.

³²⁶ Article 32 (1) of the Hague Convention.

³²⁷ Article 32 (2) of the Hague Convention.

³²⁸ Article 32 (3) of the Hague Convention.

³²⁹ Permanent Bureau (n223 above) 36.

³³⁰ Permanent Bureau (n223 above) 43.

³³¹ *Ibid.*

3.3.6 Bilateral or multilateral arrangements and agreements

Child trafficking, abduction and sale of children in the context of adoption is a serious cause for concern. There have been instances of child trafficking of children through the practice of intercountry adoption on the African continent.³³² For instance, illegal adoptions and child trafficking were detected in Mauritius in the 1980s which led to the establishment of the National Adoption Council to monitor the practice.³³³ Furthermore, cases of child trafficking have been reported in Angola³³⁴ and in Liberia in 2008 which led to the establishment of a Commission to assess the laws, policies and practices and make recommendations.³³⁵

One of the safeguards envisaged by the CRC and the ACRWC to protect children from abduction, trafficking or sale is for States Parties to enter into bilateral or multilateral arrangements or agreements. The CRC and the ACRWC mandates States Parties to conclude bilateral or multilateral arrangements and to ensure that intercountry adoption placements are conducted by competent authorities or organs.³³⁶ According to Detrick, Article 21 (e) of the CRC clearly highlights the concern of the CRC's drafters over the sale and trafficking of children in the context of adoption.³³⁷ Similarly, one of the fundamental objectives of the Hague Convention is 'to establish safeguards to ensure that intercountry adoption takes place in the best interests of the child and with respect for his or her fundamental rights...' and 'to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children.'³³⁸

Closely related to Article 21 (e) of the CRC is Article 35 which explicitly calls upon States Parties to conclude bilateral or multilateral agreements to prevent the abduction, sale and trafficking of children. The General Guidelines for Periodic Reports drawn by

³³² Mezmur (n29 above) 11.

³³³ Mezmur (n29 above) 11 and CRC Committee, State Party Report: Mauritius, (October 1995), paras 68-69.

³³⁴ Mezmur (n29 above) 11 and CRC Committee, State Party Report: Angola, 2nd to 4th Periodic Report, (February 2010), para 172.

³³⁵ Mezmur (n29 above) 11-12 and CRC Committee, State Party Report: Liberia (August 2009), paras 160 and 190.

³³⁶ Article 21 (e) of the CRC and Article 24 (e) of the ACRWC.

³³⁷ Detrick (n323 above) 354.

³³⁸ Article 1 (b) of the Hague Convention.

the CRC Committee also shed light on the CRC's views on the appropriate national, bilateral and multilateral measures to be taken by States Parties to give effect to Article 35 of the CRC. With regards to national measures, the Committee refers to legislative measures aimed at ensuring 'effective protection of children against abduction, sale and trafficking including consideration of such acts as criminal offences,'³³⁹ awareness and information campaigns to prevent the occurrence of abduction, sale and trafficking,³⁴⁰ allocation of appropriate resources for the development and implementation of relevant policies and programs,³⁴¹ national strategies and monitoring mechanisms aimed at preventing and suppressing abduction, sale and trafficking³⁴² and the establishment of special units among law enforcement officers to address the abduction, sale and trafficking in children.³⁴³ Regarding the bilateral and multilateral measures, the Committee refers to the conclusion of bilateral and multilateral agreements in the areas of international co-operation between judicial and law enforcement authorities concerning the collection and exchange of information on perpetrators of abduction, sale or trafficking of children.³⁴⁴

Furthermore, the ACRWC also mandates States Parties to 'take all appropriate measures to prevent the abduction, sale of, or traffic in children for any purpose or in any form, by any person including parents or legal guardians of the child.'³⁴⁵

3.3.7 Post-adoption follow up

Pursuant to Article 24 (f) of the ACRWC, States Parties are obligated to 'establish a machinery to monitor the well-being of the adopted child.'³⁴⁶ Mezmur asserts that this provision is in recognition of the fact that adoption is not just 'an event but a process.'³⁴⁷ Although Article 21 of the CRC is silent on the requirement for post adoption follow up,

³³⁹ General Guidelines for Periodic Reports (1996) UN Doc. CRC/C/58, para 161 and Detrick (n323 above) 602-603.

³⁴⁰ Ibid.

³⁴¹ Ibid.

³⁴² Ibid.

³⁴³ Ibid.

³⁴⁴ General Guidelines for Periodic Reports (n339 above) para 162 and Detrick (n323 above) 603.

³⁴⁵ Article 29 (a) of the ACRWC.

³⁴⁶ Article 24 (f) of the ACRWC.

³⁴⁷ B D Mezmur 'The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game' (2008) 23 *South African Public Law* 1, 27.

Article 25 of the CRC supplemented by the CRC Committee Guidelines for Periodic Reports prescribes that intercountry adoption placements should be ‘subjected to periodic reviews and appropriate measures should also be established to monitor the situation of the adopted child including following the child’s placement through intercountry adoption.’³⁴⁸

3.3.8 Other interrelated provisions of the CRC and the ACRWC

3.3.8.1 The right to a name, identity and birth registration

The CRC³⁴⁹ and the ACRWC³⁵⁰ recognize the right of a child to a name and to be registered immediately after birth. Children who are not registered are do not legally exist are at risk of child trafficking and other illegal activities in intercountry adoption.³⁵¹ In order to protect children from illegal adoptions, legislation should therefore make birth registration compulsory.³⁵²

3.3.8.2 The right to be protected from exploitation

Articles 32 and 34 of the CRC and Article 27 of the ACRWC are also closely related to Article 35 of the CRC. These provisions obligate States Parties to provide for the protection of children against all forms of exploitation including economic³⁵³ and sexual exploitation.³⁵⁴

3.4 Conclusion

Intercountry adoption is recognized in the CRC and the ACRWC as one of the possible forms of alternative care for children deprived of families. However, it poses significant risks for the best interests of the child if it is not properly regulated. This chapter has highlighted the international and regional legal framework regulating intercountry adoption with a specific focus on the Declaration on Foster Placement and Adoption, the

³⁴⁸ Article 25 of the CRC, General Guidelines for Periodic Reports (n339 above) para 84 and Detrick (n323) 440.

³⁴⁹ Article 7 of the CRC.

³⁵⁰ Article 6 of the ACRWC.

³⁵¹ UNICEF (n11 above) 8.

³⁵² Ibid.

³⁵³ Article 32 (1) of the CRC.

³⁵⁴ Article 34 of the CRC and Article 27 (1) of the ACRWC.

CRC, ACRWC and the Hague Convention. It has been shown that these instruments lay down the fundamental principles and standards requiring the best interest of the child to be given the highest level of consideration and for an adoption to be authorized by Competent/Central Authorities in accordance with applicable laws and procedures. Although these instruments are silent on how the best interests of the child can be upheld in adoption, it has been shown that the best interests of the child can be protected by ensuring that children placed for adoption are adoptable, collecting and preserving information about the child's origins, family and medical history and ensuring that matching meets the needs of the child with the qualities of the prospective adoptive parents.

The financial aspects of intercountry adoption also encourage illicit activities which violate the best interests of the child. Accordingly, these instruments require Member States to take the necessary measures to ensure that the placement of a child does not result in improper financial gain. This can be achieved by controlling and regulating the financial aspects involved in intercountry adoption and ensuring that the laws, fees and policies regulating intercountry adoption are transparent and clearly defined. One of the measures to protect the best interests of the child and prevent illicit activities is for Member States to conclude bilateral and multilateral agreements and to ensure that appropriate measures are put in place to monitor the situation of the adopted child.

Finally, these instruments require States Parties to make birth registration compulsory and to protect children from exploitation. This is due to the fact that children who are not registered are vulnerable to child trafficking and other illicit activities in intercountry adoption.

CHAPTER FOUR

CRITICAL ANALYSIS OF THE LEGISLATIVE FRAMEWORK REGULATING INTERCOUNTRY ADOPTION IN SOUTH AFRICA AND GHANA

4.1 Introduction

The preceding chapter highlighted the international and regional legal framework regulating intercountry adoption. It also stated the fundamental principles and standards that should underpin the practice of intercountry adoption and how it can be regulated to prevent and address illicit activities that violate the best interests of the child. This chapter therefore seeks to examine the legislative framework in force in South Africa and Ghana regulating intercountry adoption, against the backdrop of the international and regional standards. These laws shall be critically analyzed with a view to determining whether they provide sufficient and adequate protection to children involved in intercountry adoption.

However, before analyzing the legislative framework in these two countries, attention will be placed on the relevance of international law in the South African and Ghanaian domestic legal framework with particular emphasis on the CRC, ACRWC and the Hague Convention. The chapter will also provide an overview of the protection of children's rights under the South African and Ghanaian Constitution.

4.2 The relevance of international law in South Africa and Ghana

This section examines how South Africa and Ghana incorporate international human rights instruments into their legal system with a particular focus on the CRC, ACRWC and the Hague Convention. It also discusses how these instruments serve as sources of law and as interpretative standards for the courts.

4.2.1 The relevance of international law in South Africa

The relevance of international law in the domestic legal system of South Africa is provided for under Sections 231 and 232 of the Constitution.³⁵⁵ In terms of Section 231, ‘an international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces...’ Furthermore, Section 231 (4) prescribes that ‘any international agreement becomes law in the Republic when it is enacted into law by national legislation.’ This means that South Africa is a dualist state whereby an international agreement first requires Parliamentary approval before ratification and once it has been ratified it must be domesticated in the national laws of South Africa. Thus, the CRC, ACRWC and the Hague Convention ratified in 1995, 1997 and 2003 respectively have to be domesticated in the national laws of South Africa in order to form part of South African law. However, self executing agreements and customary international law automatically form part of South African law unless it contravenes the Constitution or national legislation.³⁵⁶

South Africa is also bound by international agreements which were entered into before the 1996 Constitution came into force.³⁵⁷ Thus, although South Africa ratified the CRC in 1995 before the Constitution entered into force, it is still legally bound by the CRC. However, for the CRC to be implemented and to form part of the South African law, it has to be domesticated in the national laws of South Africa.

The Constitution also gives international law a role in the interpretation of the rights embodied in the bill of rights. Thus, in terms of Section 39 (1) (b) of the Constitution, a court, tribunal or forum should consider international law when interpreting the bill of rights. This position was reaffirmed in the case of the *State v Makwanyame and Another*³⁵⁸ where the Constitutional Court (CC) held that international law in this context includes both binding and non-binding international instruments to South

³⁵⁵ Act 108 of 1996.

³⁵⁶ Sections 231 (4) and 232 of the Constitution.

³⁵⁷ Section 231 (5) of the Constitution.

³⁵⁸ *State v Makwanyame and Another* 1995 (6) BCLR 665 (CC) at para. 686 D-F.

Africa. This means that binding and non-binding instruments may be used as interpretative tools in South Africa.³⁵⁹

4.2.2 The relevance of international law in Ghana

The relationship between international law and the Ghanaian legal system is provided for under Section 75 of the Constitution.³⁶⁰ Section 75 (1) of the Constitution vests in the President the power to execute or cause to be executed treaties, agreements or conventions. Furthermore, a treaty, agreement or convention that has been executed shall be subject to ratification by an Act of Parliament³⁶¹ or Parliamentary resolution.³⁶² This means that Ghana has a dualist system where Parliamentary approval is required before any international instrument is ratified and once it has been ratified it must be domesticated in the national laws before it can be applied by the courts. This position was confirmed in the case of *NPP v Attorney-General (CIBA case)* where Ampiah JSC stated:

[L]aws, municipal or otherwise, which are found to be inconsistent with the Constitution cannot be binding on the state whatever their nature. International laws, including intra African enactments are not binding on Ghana until such laws have been adopted or ratified by the municipal laws.... This is a principle of public international law which recognizes the sovereignty of States as a prerequisite for international relationship and law.³⁶³

Therefore, although Ghana ratified the CRC in 1990 and the ACRWC in 1997, these treaties must be domesticated before they can be invoked in the courts of law. However, even where international instruments have not gone through a Parliamentary process, principles of international law may still be applied by the courts in terms of Article 40 which mandates the Government to ‘promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means’³⁶⁴ and adhere to the principles embodied in the international instruments of all international

³⁵⁹ Ibid.

³⁶⁰ The Constitution of the Republic of Ghana, 1992.

³⁶¹ Section 75 (2) (a) of the Constitution.

³⁶² Section 75 (2) (b) of the Constitution.

³⁶³ *NPP v Attorney-General (CIBA case)* [1996-97] 729 at 761.

³⁶⁴ Article 40 (c) of the Constitution.

organizations to which Ghana is a member.³⁶⁵ Thus, the court has the discretion to apply principles of international law that have not gone through the formal process to human rights issues.

4.3 Protection of children's rights in the South African and Ghanaian Constitution

The South African Constitution recognizes the vulnerability of children to violations of their rights and that they have specific interests. Accordingly, children's rights are protected by the Bill of Rights under the Constitution of South Africa. These rights can be classified as general and specific rights of children. Although children have rights that are specific and unique to them, they are also entitled to the enjoyment of other rights embodied in the Constitution such as the right to education.

Section 28 of the Constitution specifically deals with children's rights such as the right to a name and nationality from birth³⁶⁶ and the right to shelter and basic health care services among others.³⁶⁷ Although it does not expressly address intercountry adoption, it contains some provisions that are relevant to children when they are adopted internationally. The Constitution provides for the best interests of the child as of paramount importance in every matter concerning the child.³⁶⁸ This is in line with one of the most important cardinal principles of the CRC³⁶⁹ and the ACRWC.³⁷⁰ The best interests of the child should therefore be the guiding principle in any decision affecting the adoption of children. Some schools of thought have criticized this provision arguing that it is too vague and that it fails to provide a determinate standard.³⁷¹ However, it was held in the *Fitzpatrick* case that the best interest of the child principle should be flexible in order to cater for the needs of specific children in specific circumstances.³⁷²

³⁶⁵ Article 40 (d) of the Constitution.

³⁶⁶ Section 28 (1) (a) of the Constitution.

³⁶⁷ Section 28 (1) (c) of the Constitution.

³⁶⁸ Section 28 (2) of the Constitution.

³⁶⁹ Article 1 of the CRC.

³⁷⁰ Article 2 of the ACRWC.

³⁷¹ J De Waat et al 'Constitutional Protection of Children' in C J Davel (ed) *Introduction to Child Law in South Africa* (2000) 249.

³⁷² *Minister for Welfare and Population Development v Fitzpatrick* 2000 (7) BCLR 713 (CC) 18, *Fitzpatrick v Minister of Social Welfare and Pensions* 2000 (3) SA 139.

The 1992 Constitution of Ghana also contains a Bill of Rights which protects the fundamental rights and freedoms of people in Ghana. However, Section 28 specifically deals with the rights of children in addition to their entitlement to the enjoyment of other rights as ordinary inhabitants of Ghana. These include the right to special care and maintenance³⁷³ and the right to be protected from engaging in work that constitutes a threat to the child's health, education or development among others.³⁷⁴ The Constitution, however, contains no provision addressing the best interests of the child principle.

4.4 Analysis of South Africa and Ghana's legislative framework on intercountry adoption

Prior to the adoption of the Children's Act of 2005, intercountry adoption was not legally permitted in South Africa. The Child Care Act No. 74 of 1983 regulated all matters affecting children such as national adoption but it did not address intercountry adoption. However, following the ruling of the CC in the *Fitzpatrick* case,³⁷⁵ intercountry adoption is now recognized as an alternative means of care for children deprived of families. In the case, the CC found Section 18 (4) (f) of the Child Care Act 74 of 1983 which prohibited the adoption of South African children by foreigners to be unconstitutional and inconsistent with Section 28 (2) of the Constitution which provides that 'a child's best interests are of paramount importance in every matter concerning the child.' The CC held as follows:

The provisions of Section 18 (4) (f) are too blunt and all-embracing to the extent that they provide that under no circumstances may a child born to a South African citizen be adopted by non-South African citizens. To that extent they do not give paramountcy to the best interests of children and are inconsistent with the provisions of Section 28 (2) of the Constitution and hence invalid.³⁷⁶

As a result of the CC's decision, Section 18 (4) (f) of the Child Care Act was deleted in its entirety. In recognition of the inadequate protection afforded to South African children involved in intercountry adoption, the South African Government ratified the

³⁷³ Section 28 (1) (a) of the Constitution.

³⁷⁴ Section 28 (2) of the Constitution.

³⁷⁵ *Fitzpatrick case* (n372 above).

³⁷⁶ *Fitzpatrick case* (n372 above) para 20.

Hague Convention in 2003. In order to harmonize its domestic laws with the standards of the Hague Convention, South Africa enacted the Children's Act of 2005.³⁷⁷ This opened up the practice of intercountry adoption in South Africa. Since the enactment of Children's Act, Regulations to the Children's Act were also adopted in April 2010 to elaborate on the provisions of the Children's Act. The Children's Act of 2005 read with the Regulations seek to regulate the practice of intercountry adoption and to provide protection to children involved in intercountry adoption. These laws are expected to regulate intercountry adoption in a manner that is equivalent to the principles and standards set by the international and regional instruments.

Ghana was the first country in the world to ratify the CRC on 5 February 1990.³⁷⁸ In order to harmonize its national laws with the international human rights standards, Ghana promulgated a new Constitution in 1992.³⁷⁹ The Constitution was the first major instrument for the protection of children's rights in Ghana. Notwithstanding these positive developments, the constitutional provisions concerning children's rights were considered insufficient to meet the principles of the CRC.³⁸⁰ Thus, efforts to offer better protection of children's rights in Ghana resulted in the enactment of the Children's Act, 1998.

The Children's Act is described as the single most comprehensive legislation on children's rights.³⁸¹ It builds on the foundation laid by the Constitution by putting in place detailed provisions on children's rights.³⁸² Ghana, through its Children's Act makes provision, although not so clear for the regulation of intercountry adoption. Although Ghana is considered to be one of the African countries with a high

³⁷⁷ Act No. 38 of 2005 Children's Act.

³⁷⁸ E Appiah 'Protecting the rights of children in Ghana: The legal framework and ancillary matters' available at cepa.org.gh/researchpapers/Protecting69.pdf, accessed on 20 December 2013.

³⁷⁹ Ibid.

³⁸⁰ Ibid.

³⁸¹ Harmonisation of Children's Laws in Ghana available at acerwc.org/wp-content/uploads/2012/05/English-ACERWC-Ghana-Harmonisation-of-Laws-on-Children.pdf, accessed on 24 January 2014.

³⁸² Ibid.

international adoption rate, it has not ratified the Hague Convention.³⁸³ As a result, its laws on intercountry adoption have not been adequately elaborated to reflect international standards. Despite the non ratification of the Hague Convention by Ghana, the provisions of the Hague Convention will be referred to in order to show how they can be used to bring the laws of Ghana on intercountry adoption in conformity with the international standards.

This section will therefore entail a critical analysis of the abovementioned laws in order to determine whether or not they conform to the international standards. It will focus on the requirements and principles for intercountry adoption and the procedural requirements involved, safeguards to prevent the abduction, sale and trafficking of children. In addition, the roles played by the Courts and Competent/Central Authorities in protecting the best interests of the child will also be highlighted. Some inherent flaws in the legislation will be outlined and suggestions will be made on how the legislative framework can be improved to meet the international standards.

4.4.1 Requirements and principles for intercountry adoption

Before an adoption order can be granted by the Court, there are certain requirements and principles that have to be satisfied. These are discussed in detail below:-

4.4.1.1 Who can be adopted?

The South African Children's Act makes provision for persons who can be adopted. In terms of Section 230 (1) (a), a child may be adopted if it is in the best interests of the child. It is commendable that the Children's Act attaches importance on the best interests of the child principle in determining the adoptability of a child. This is in line with the international standards which require intercountry adoption to be authorized if it is in the best interests of the child.

³⁸³ For instance it is recorded that a total of 242 602.00 children have been adopted from Ghana from 1999-2012 in just the United States of America alone, *available at* adoption.state.gov.about_us/statistics.php, accessed on 20 December 2013.

The Children's Act also provides that a child may be adopted if 'the child is adoptable.'³⁸⁴ This is vital in protecting the best interests of the child and preventing the abduction, sale and trafficking in children. Accordingly, Section 230 (3) of the Children's Act sheds light on how to determine the adoptability of the child. It provides that a child is adoptable if:-

- a) the child is an orphan and has no guardian or caregiver who is willing to adopt the child;
- b) the whereabouts of the child's parent or guardian cannot be established;
- c) the child has been abandoned;
- d) the child's parent or guardian has abused or deliberately neglected the child, or has allowed the child to be abused or deliberately neglected; or
- e) the child is in need of a permanent alternative placement.

Furthermore in terms of Regulation 98 (3), if an adoption social worker is satisfied that a child is adoptable, he/she must apply for the child's name to be registered in the Register on Adoptable Children and Prospective Adoptive Parents (RACAP).³⁸⁵ This serves to ensure that children who are placed for intercountry adoption are genuinely adoptable.

Although Ghana permits intercountry adoption, the Children's Act implicitly regulates intercountry adoption. There are no clear rules of procedure and requirements regulating intercountry adoption as required by the international standards. As a result, the Court relies on the requirements on national adoption to applications for intercountry adoption in determining the persons who may be adopted, eligibility of applicants, consent to an adoption and other procedural requirements. The absence of clear rules of procedure regulating intercountry adoption enables the corruption and other system abuses which violate the best interests of the child.

Even though not spelled out in clear terms, the Children's Act of Ghana makes provision for persons who can be adopted. It defines a child as a 'person below the age of eighteen years.'³⁸⁶ It can be inferred from this provision that persons below the age of

³⁸⁴ Section 230 (1) (b) of the Children's Act.

³⁸⁵ The RACAP is a register that is kept and maintained by the Director-General in terms of Section 232 (1) which contains information about adoptable children and parents that are eligible to adopt.

³⁸⁶ Section 1 of the Children's Act.

18 years are eligible for adoption. However, there is no provision in the Children's Act which addresses the criteria to determine the adoptability of a child to ensure that children placed for adoption are adoptable. It is submitted that the lack of provisions addressing the adoptability of a child has the potential to compromise the best interests of the child and create avenues for illicit activities such as child trafficking.

4.4.1.2 Persons who may adopt a child

The purpose of intercountry adoption is to provide children deprived of families with loving homes and security. The CRC³⁸⁷ and the ACRWC³⁸⁸ therefore mandate States Parties to determine in accordance with their national laws and procedures persons who are eligible and best suited to adopt a child.

Section 231(1) of the South African Children's Act provides qualifications for persons who may adopt a child. It prescribes that a child may be adopted:-

- a) Jointly by-
 - i) a husband and wife;
 - ii) partners in a permanent domestic life-partnership; or
 - iii) other persons sharing a common household and forming a permanent family unit;
- b) by a widower, widow, divorced or unmarried person;
- c) by a married person whose spouse is the parent of the child or by a person whose permanent domestic life-partner is the parent of the child;
- d) by the biological father of a child born out of wedlock; or
- e) by the foster parent of the child.

In addition, persons who are eligible to adopt are registered in the RACAP.³⁸⁹ Persons who meet the above requirements must also be fit and proper to be entrusted with parental responsibilities,³⁹⁰ willing and able to maintain those responsibilities,³⁹¹ above the age of 18 years³⁹² and must be assessed by an adoption social worker.³⁹³ It is

³⁸⁷ Article 21 (a) of the CRC.

³⁸⁸ Article 24 (a) of the ACRWC.

³⁸⁹ Regulation 98 (1) of the Children's Act.

³⁹⁰ Section 231 (2) (a) of the Children's Act.

³⁹¹ Section 231 (2) (b) of the Children's Act.

³⁹² Section 231 (2) (c) of the Children's Act.

submitted that these requirements are vital in ensuring that adoptions take place in the best interests of the child.

Section 231 (6) further disqualifies persons who are unsuitable to work with children from adopting. The disqualification of persons who are unsuitable to work with children from adopting is a necessary inroad to protect children from abuse and any other acts which may violate the best interests of the child.

In order to ensure that these requirements have been met, the Children's Court is vested with the jurisdiction to administer the Children's Act. Thus, it plays a crucial role in ensuring that a child is placed with suitable adoptive parents. Accordingly, before the Court grants an adoption order it has to be satisfied that the abovementioned requirements concerning persons who may adopt have been fully complied with.³⁹⁴

The Children's Act of Ghana also makes provision for persons who may adopt a child. In terms of Section 66, a child may be adopted jointly by a husband and wife³⁹⁵ or by the mother or father of the child alone.³⁹⁶ Single persons are also allowed to adopt only if the applicant is a Ghanaian citizen and if the adoption is in the best interests of the child.³⁹⁷

Male applicants are precluded from adopting unless the child to be adopted is the applicant's son or if the court determines that special circumstances apply.³⁹⁸ This requirement is also vital in protecting children, particularly young girls against sexual abuse and exploitation.

The Children's Act also puts in place age requirements in respect of persons who are eligible to adopt. In terms of Section 67 (1), applicants should be 25 years of age and at least 21 years older than the child. The same requirement also applies if the applicant is the child's relative.³⁹⁹ It is the author's view that the age requirement is intended to

³⁹³ Section 231 (2) (d) of the Children's Act.

³⁹⁴ Section 261 (5) of the Children's Act.

³⁹⁵ Section 66 (1) of the Children's Act.

³⁹⁶ Section 66 (2) of the Children's Act.

³⁹⁷ Section 66 (3) of the Children's Act.

³⁹⁸ Section 67 (2) of the Children's Act.

³⁹⁹ Section 67 (1) (b) of the Children's Act.

protect children from sexual abuse.⁴⁰⁰ In Ghana, the Criminal Code prohibits sexual intercourse with a child below the age of 16 years with or without the child's consent and attaches a penalty of between 7 and 25 years imprisonment.⁴⁰¹ However, the prohibition becomes inoperative once the child attains the age of 16 years. This means that there is a potential danger of children being sexually abused once they attain the age of 16 years. The age requirement therefore serves to ensure that an adoptive parent is mature enough to perceive the child as his/her own child and not as a sexual partner.

4.4.1.3 Residency requirements

Although intercountry adoption provides children deprived of parental care with loving homes and security, it also exposes children to child trafficking and other illicit activities. The Children's Act of Ghana recognizes the potential risks intercountry adoption poses for children when they are adopted and puts in place residency requirements before prospective adoptive parents are eligible to adopt a child. In terms of Section 67 (3) (a), 'an adoption order shall not be made unless the applicant and the child reside in Ghana.' The requirement does not apply if the applicant is a Ghanaian citizen resident abroad.⁴⁰² In addition, prospective adoptive parents must have fostered the child for at least three months prior to the adoption of the child.⁴⁰³ The residency requirement is of paramount importance in protecting the best interests of the child and preventing illicit activities. If the child and the adoptive parent are resident in Ghana, the Department of Social Welfare (DSW) will be in a position to monitor and review the situation of the adopted child and to ensure that the 'adoption is well intended.'⁴⁰⁴ In South Africa, there is no residency requirement for prospective adoptive parents.

4.4.1.4 The best interests of the child principle

The CRC, ACRWC and the Hague Convention require the best interests of the child in adoption to be given the highest level of prominence. The Children's Act of South Africa contains several provisions which embody the principle of the best interests of

⁴⁰¹ Section 101 of the Criminal Code (Amendment Act) 1998.

⁴⁰² Section 67 (3) (a) of the Children's Act.

⁴⁰³ Section 67 (3) (b) of the Children's Act.

⁴⁰⁴ Mezmur (n29 above) 22.

the child.⁴⁰⁵ However, in the context of intercountry adoption, the best interest of the child underpins the decisions of the Court and the Central Authority in the adoption of children.⁴⁰⁶ Before the Court grants an adoption order, it has to consider whether the adoption serves the best interests of the child.⁴⁰⁷ In interpreting the best interests of the child principle, the Court should take into account a number of factors which include the child's age, maturity and development,⁴⁰⁸ gender,⁴⁰⁹ background,⁴¹⁰ any disability the child may have⁴¹¹ and the need for the child to grow up in a stable environment.⁴¹² It is however submitted that the factors to be considered should not be exhaustive and limited but should depend on the circumstances of each case.

Furthermore, the Children's Act empowers the Central Authority to withdraw its consent to an adoption within a period of 140 days from the date the consent was given if such withdrawal is in the best interests of the child.⁴¹³ In the event that the Central Authority withdraws its consent to the adoption, the child must be immediately returned to the Republic.⁴¹⁴ This clearly indicates the importance attached to upholding the best interests of the child in adoption matters.

Similarly, the Children's Act of Ghana entrenches the best interests of the child principle.⁴¹⁵ However, in the context of adoption, the best interest of the child principle also underlies the decision of the Court. It is a mandatory obligation of the Court that before granting an adoption order, it has to be satisfied that the adoption is in the best interests of the child.⁴¹⁶

⁴⁰⁵ See for instance Sections 7, 9 and 230 (1) (a) of the Children's Act.

⁴⁰⁶ The Central Authority is responsible for intercountry adoption placements in South Africa.

⁴⁰⁷ Section 261 (5) (a) of the Children's Act.

⁴⁰⁸ Section 7 (1) (g) (i) of the Children's Act.

⁴⁰⁹ Section 7 (1) (g) (ii) of the Children's Act.

⁴¹⁰ Section 7 (1) (g) (iii) of the Children's Act.

⁴¹¹ Section 7 (1) (i) of the Children's Act.

⁴¹² Section 7 (1) (k) of the Children's Act.

⁴¹³ Section 261 (6) of the Children's Act.

⁴¹⁴ Section 261 (6) (b) of the Children's Act.

⁴¹⁵ Section 2 (1) and 2 (2) of the Children's Act.

⁴¹⁶ Sections 70 (1) (b) and 85 (2) of the Children's Act.

4.4.1.5 Institutional Structures: Competent/Central Authorities and Accredited bodies

The CRC and the ACRWC require intercountry adoption to be authorized only by Competent Authorities.⁴¹⁷ Although the CRC and the ACRWC do not provide guidance on what constitutes ‘competent authorities,’ the Hague Convention requires Contracting States to ensure that intercountry adoption is authorized by Central Authorities and Accredited bodies. These institutions play a crucial role in protecting the best interests of the child and preventing illicit activities.⁴¹⁸

Accordingly, the Children’s Act of South Africa puts in place such an institutional structure consisting of Central Authorities and Accredited bodies. In terms of the Children’s Act, the Director-General is the Central Authority in the Republic.⁴¹⁹ The functions of the Central Authority assigned by the Hague Convention are to be performed after consultation with the Director-General: Justice and Constitutional Development.⁴²⁰ The Central Authority can also delegate its powers or duties under the Hague Convention to an official in the Department,⁴²¹ other organs of state⁴²² or accredited bodies.⁴²³

The Children’s Act recognizes the danger of exposing children to illicit activities through adoptions carried out by private adoption agencies. Thus, it gives the Central Authority a broad range of powers with regards to the accreditation and supervision of agencies operating in the Republic and the overall control of the adoption process. The control and accreditation of adoption agencies has the potential to eliminate illegal private adoption agencies which are cloak for trafficking in children. Firstly, the Children’s Act empowers the Central Authority to accredit child protection organizations to provide intercountry adoption services for a certain period and on such conditions as may be prescribed.⁴²⁴ The Central Authority also keeps a register of all

⁴¹⁷ Article 21 (a) of the CRC and 24 (a) of the ACRWC.

⁴¹⁸ African Child Policy Forum (n15 above) 32.

⁴¹⁹ Section 257 (1) (a) of the Children’s Act.

⁴²⁰ Section 257 (2) of the Hague Convention.

⁴²¹ Section 258 (1) of the Hague Convention.

⁴²² Section 258 (2) (a) of the Hague Convention.

⁴²³ Section 258 (2) (b) of the Hague Convention.

⁴²⁴ Section 259 (1) (a) and Section 259 (2) of the Children’s Act.

accredited child protection organizations.⁴²⁵ This allows the Central Authority to monitor and supervise the activities of the accredited bodies to ensure that they uphold children's best interests in adoption. The Central Authority can also cancel the accreditation of such organizations if they engage in illicit activities.⁴²⁶ This helps to deter and combat activities in breach of the Children's Act. In addition, accredited organizations whose employees engage in illegal adoptions or trafficking in children are held liable for the acts committed by their employees.⁴²⁷

The Central Authority also controls and monitors agreements entered into by accredited adoption agencies in the Republic with accredited adoption agencies in other countries. According to Section 260 of the Children's Act, 'a child protection organization accredited in terms of Section 259 to provide intercountry adoption services may enter into an adoption working agreement with an accredited adoption agency in another country.'⁴²⁸ However, such agreements must first be approved by the Central Authority.⁴²⁹ The control of the activities of accredited organizations is vital in protecting children and combating illicit activities.

The Central Authority also plays a crucial role in taking appropriate measures to ensure that the placement of children does not result in improper financial gain. This is of paramount importance in protecting children and families from being exploited by those facilitating the process. In terms of Section 259 (3) (b), accredited child protection organizations are mandated to 'annually submit audited financial statements to the Central Authority of the fees received and payments made.'⁴³⁰ Significantly, accredited organizations which engage in improper financial gain risk having their licenses revoked by the Central Authority.⁴³¹

In order to eliminate illegal adoption agencies, Section 250 explicitly prohibits any person from providing adoption services except an accredited child protection

⁴²⁵ Section 251 (2) of the Children's Act.

⁴²⁶ Section 284 (4) of the Children's Act.

⁴²⁷ Section 284 (3) of the Children's Act.

⁴²⁸ Section 260 (1) of the Children's Act.

⁴²⁹ Section 260 (2) (a) of the Children's Act.

⁴³⁰ Section 259 (3) (b) of the Children's Act.

⁴³¹ Section 284 (4) of the Children's Act.

organization in terms of Section 251,⁴³² an adoption social worker,⁴³³ the Central Authority in the case of intercountry adoption⁴³⁴ and a child protection organization accredited to provide intercountry adoption services.⁴³⁵ In addition, Section 305 (1) (b) makes it an offence to contravene this provision.

Ghana has no Central Authority to provide adoption services and safeguard the best interests of the child as required by the Hague Convention. The Children's Act does not provide for the establishment of such an institutional structure or for the accreditation of bodies to provide adoption services. Although Ghana is not a Contracting State to the Hague Convention, a Central Authority is a crucial body in the adoption process. There being no Central Authority in Ghana, intercountry adoption placements fall within the purview of the Department of Social Welfare (DSW)⁴³⁶ without clear rules of procedure regulating intercountry adoption and safeguards to protect children when they are adopted. Although it is commendable that the DSW is in charge of intercountry adoption in Ghana, it is the author's view that taking into account the broad functions of the Central Authority as required by the Hague Convention, the DSW is not anywhere near being a Central Authority. Without a formal system of co-operation and communication as required by the Hague Convention between the sending and receiving state, there is a potential risk of illicit activities which violate the best interests of the child. For instance, there have been reports of illicit activities such as child trafficking and abduction as a result of 19 illegal adoption agencies operating illegally in Ghana.⁴³⁷ The Children's Act therefore needs to be reviewed to make provision for the establishment of a Central Authority.

⁴³² Section 250 (1) (a) of the Children's Act.

⁴³³ Section 250 (1) (b) of the Children's Act.

⁴³⁴ Section 250 (1) (c) of the Children's Act.

⁴³⁵ Section 250 (1) (d) of the Children's Act.

⁴³⁶ Section 85 (1) of the Children's Act.

⁴³⁷ Ghana to streamline intercountry adoption available at www.modernghana.com/news/399363/1/ghana-to-streamline-inter-country-adoption.html, accessed on 18 December 2013.

4.4.1.6 *The Subsidiarity principle*

The Children's Act of South Africa makes provision for the implementation of the subsidiarity principle by ensuring that domestic measures are prioritized before a child can be placed for intercountry adoption. The Children's Act makes it mandatory that before a child is given up for intercountry adoption, 'the name of the child should be placed in the RACAP for at least 60 days and no fit and proper adoptive parent for the child is available in the Republic.'⁴³⁸ It is the author's view that the period of 60 days is sufficient to ensure compliance with the subsidiarity principle and to ensure that children are not unreasonably kept in institutions or orphanages when a permanent family placement is available abroad.

Furthermore, in order to ensure compliance with the subsidiarity principle, it is mandatory that before the Court grants an adoption order, it has to be satisfied that the child's name has been in the RACAP for the stipulated time frame and that no adoptive parent is available in the Republic. This serves to ensure that the subsidiarity principle is adequately implemented before an adoption order is made.

The South African Courts have also validated the application of the subsidiarity principle. South African courts have held that 'to ensure compliance with the principle of subsidiarity as expressed in Article 21 of the CRC it must be established that the child cannot be cared for through foster care or adoption or other suitable care in his or her country of origin.'⁴³⁹ In the case of *De Gree v Webb*, baby R was found 'abandoned a few days after her birth, head-first in a bucket under a tree.'⁴⁴⁰ At the time of the case, R's parents and other family members had not been traced.⁴⁴¹ The Appellants, who were African Americans, met baby R, 'became extremely fond of her, and took steps towards adopting her.'⁴⁴² The CC, however, found that there was evidence 'as to the availability of prospective local adoptive parents, including black South Africans, eager to adopt

⁴³⁸ Section 261(5)(g) of the Children's Act. The RACAP is a Register on Adoptable Children and Prospective Adoptive Parents which is kept and maintained by the Director General for the purpose of keeping a record of adoptable children and a record of fit and proper adoptive parents: Sections 232 (1) (a) and (b) of the Children's Act.

⁴³⁹ *De Gree v Webb 2008 (4) BCLR 359 (CC) at 15 para 22.*

⁴⁴⁰ *De Gree* case (n439 above) para 2.

⁴⁴¹ *Ibid.*

⁴⁴² *De Gree* case (n439 above) para 3.

female children from birth to five years of age.’⁴⁴³ Because of the possibility of adoption to local parents, the African American couple was denied the adoption, as intercountry adoption is only allowed after possibilities for placement within the child’s country of origin have been given due consideration.⁴⁴⁴

The CC has however stated in the case of *AD V DW* that although the subsidiarity principle must be adhered to, this is ‘not to say the principle of subsidiarity is the ultimate governing factor in intercountry adoptions.’⁴⁴⁵ Thus, it is the best interests of the child principle that has been found to be the ultimate governing factor and not the subsidiarity principle.

The Children’s Act of Ghana also contains a provision addressing the subsidiarity principle. According to Section 85 (1) of the Children’s Act, ‘the Department may investigate an application for inter-country adoption as an alternative means of care, if a child cannot be placed in a foster or an adoptive family in Ghana or cannot in any suitable manner be cared for in Ghana.’

Although the Children’s Act complies with the international standards, it is the author’s view that the said provision does not regulate the subsidiarity principle in a comprehensive manner. There are no clear procedures put in place to ensure that the subsidiarity principle is adequately implemented before a child is made available for intercountry adoption. Furthermore, the Children’s Act does not place a mandatory obligation on the Court before granting an adoption order to be satisfied that the subsidiarity principle has been complied with. The inadequate nature of the law on the subsidiarity principle creates a climate that is conducive to child trafficking and other illicit activities which violate the best interests of the child. Children can be wrongfully placed for intercountry adoption when there are possibilities for national solutions.

⁴⁴³ *De Gree* case(n439 above) para 25.

⁴⁴⁴ *Isanga* (n26 above) 254.

⁴⁴⁵ *AD v DW 2007 ZACC (CC) para 49.*

4.4.1.7 Post-adoption follow up

Article 24 (f) of the ACRWC mandates Member States to ‘establish a machinery to monitor the well-being of the adopted child.’ Both the Children’s Act of South Africa and Ghana do not contain provisions requiring the placement of an adopted child to be monitored.

Ironically, the Children’s Act of Ghana requires 30 days notice to be given to the DSW before an adopted child is permanently removed from the country.⁴⁴⁶ However, it fails to put in place safeguards for protection or measures to monitor the situation of the adopted child.

4.4.2 Procedure for intercountry adoption

The CRC and the ACRWC require proper procedures to be put in place for intercountry adoption.⁴⁴⁷ However, both instruments do not provide guidance on the procedure that States can emulate to ensure compliance with the international standards. It is therefore entirely left to the discretion of States to establish the procedure for intercountry adoption. The Hague Convention, however, explicitly requires applications for intercountry adoption to be made through the Central Authorities in the respective Contracting States.⁴⁴⁸ The system of co-operation and communication between the Central Authority in the receiving and sending state is crucial in protecting children and preventing illicit activities.

In South Africa, the Children’s Act mirrors the procedure established by the Hague Convention. The same procedure also applies to non-Convention adoptions. In the case of a Convention adoption, Section 261 prescribes that when a person habitually resident in a Convention country intends to adopt from the Republic, the person/s should apply to the Central Authority in their country of residence.⁴⁴⁹ If the Central Authority of the Convention country is satisfied that the applicant is fit and eligible to adopt, it prepares a

⁴⁴⁶ Section 84 of the Children’s Act.

⁴⁴⁷ Article 21 (a) of the CRC and 24 (a) of the ACRWC.

⁴⁴⁸ Articles 14-22 of the Hague Convention.

⁴⁴⁹ Section 261 (1) of the Children’s Act.

report on that person which is sent to the Central Authority of the Republic.⁴⁵⁰ The report on the applicant should include information about the medical health status, the ethnic, religious and cultural background of the applicant, an assessment by the social worker, character of the applicant and applicant's family members among others.⁴⁵¹ If an adoptable child is available for adoption, the Central Authority of the Republic also prepares a similar report on the child which is transmitted to the Central Authority of the Convention country.⁴⁵² The report also includes the views of the child depending on the age and maturity of the child and the child's consent.⁴⁵³ If both Central Authorities agree on the adoption, the Central Authority of the Republic refers the application and the relevant documents to the Children's Court for consideration.⁴⁵⁴ The exchange of detailed reports by the Central Authorities concerning the child and the prospective adoptive parents is also important in ensuring that matching satisfies the best interests of the child.

Before the Court grants an adoption order it has to be satisfied that the requirements concerning persons who are eligible to adopt has been complied with.⁴⁵⁵ Furthermore, an adoption order may be granted if:-

- a) the adoption is in the best interests of the child;
- b) the child is in the Republic;
- c) the child is not prevented from leaving the Republic-
 - i) under a law of the Republic; or
 - ii) because of an order of a court of the Republic;
- d) the arrangements for the adoption of the child are in accordance with the requirements of the Hague Convention on Intercountry Adoption and any prescribed requirements;
- e) the central authority of the convention country has agreed to the adoption;
- f) the Central Authority of the Republic has agreed to the adoption;
- g) the name of the child has been in the RACAP for at least 60 days and no fit and proper adoptive parent for the child is available in the Republic.⁴⁵⁶

⁴⁵⁰ Section 261 (2) of the Children's Act.

⁴⁵¹ Regulation 111 of the Children's Act.

⁴⁵² Section 261 (3) of the Children's Act.

⁴⁵³ Regulation 112 of the Children's Act.

⁴⁵⁴ Section 261 (4) of the Children's Act.

⁴⁵⁵ Section 261 (5) of the Children's Act.

The abovementioned procedure is similar if a child is adopted in a non-Convention country. However, applications in the receiving state are made through the competent authorities.⁴⁵⁷

Sections 264 and 265 also prescribe the procedure to be followed when SA is a receiving state from a convention or non-convention country. In such a case, a prospective adoptive parent/s who wishes to adopt applies to the Central Authority in the Republic. If the Central Authority is satisfied that the applicant is eligible to adopt, it prepares a report about the suitability of the applicant. The report is thereafter sent to the Central or Competent authority of the sending state in order to match the child with the prospective adoptive parents.

In Ghana, applications for intercountry adoption are made to the DSW.⁴⁵⁸ However, there is no explicit provision made in the Children's Act on the procedure involved in intercountry adoption once an application has been lodged with the DSW to ensure that the adoption takes place in the best interests of the child. Furthermore, the Children's Act fails to put in place guiding rules to assist the DSW in the adoption process to ensure that the best interests of the child are upheld and to prevent illicit activities. The absence of a Central Authority to co-ordinate and oversee the adoption process coupled with the lack of guiding rules to assist the DSW has the potential danger of intercountry adoption being plagued by illicit activities and system abuses.

4.4.3 Safeguards to prevent abduction, sale and trafficking in children for adoption

Children involved in intercountry adoption are at risk of being exploited, trafficked and abducted by those facilitating the adoption process. Thus, States that permit intercountry adoption should ensure that adequate safeguards and protective measures are put in place in their domestic laws to prevent the abduction, sale and trafficking in children for adoption.

⁴⁵⁶ Section 261 (5) (a)-(e) of the Children's Act.

⁴⁵⁷ Section 262 (1) of the Children's Act.

⁴⁵⁸ Section 85 (2) of the Children's Act.

4.4.3.1 Ensuring that proper consents to an adoption are given

Ensuring that proper consents to an adoption are given without inducement is one of the safeguards to protect children from abduction or trafficking for the purposes of adoption. Legislation regulating intercountry adoption should therefore make provision for proper consents to an adoption to be given.

The Children's Act of South Africa mirrors the international standards by requiring the consent to adoption to be obtained from the parents of the child⁴⁵⁹ or any other person who holds guardianship of the child.⁴⁶⁰ In addition, the Children's Act requires the consent of a child aged 10 years or older to be given.⁴⁶¹ The consent of a child below the age of 10 is also required depending on the level of maturity of the child to understand the effects of giving such consent.⁴⁶² This serves to ensure the participation of children in the adoption process as required by Articles 4 (2) and (3) of the Hague Convention and Article 12 of the CRC. Prior to giving their consent, the Children's Act makes it mandatory for the relevant persons to be counseled by the social worker facilitating the adoption.⁴⁶³ The requirement for the relevant persons to undergo mandatory counseling prior to giving their consent serves to ensure that free and informed consent is obtained in line with the international standards. This provision seems revolutionary compared to the CRC and the Hague Convention which does not make counseling mandatory.

In terms of the Children's Act, the consent to an adoption must be given in the presence of a presiding officer of the Children's Court.⁴⁶⁴ It is also the duty of the Presiding officer to verify that the consent has been given.⁴⁶⁵ However, before the Presiding officer verifies the consent, he/she must inform the person giving the consent of the effect of consenting to an adoption and the right to withdraw the consent within 60 days from the date of giving the consent.⁴⁶⁶ Mezmur rightfully argues that the requirement to

⁴⁵⁹ Section 233 (1) (a) of the Children's Act.

⁴⁶⁰ Section 233 (1) (b) of the Children's Act.

⁴⁶¹ Section 233 (1) (c) of the Children's Act.

⁴⁶² Section 233 (1) (d) of the Children's Act.

⁴⁶³ Section 233 (4) of the Children's Act.

⁴⁶⁴ Section 233 (6) (a) (i) and (ii) of the Children's Act.

⁴⁶⁵ Section 233 (6) (a) (iii) of the Children's Act.

⁴⁶⁶ Regulation 101 and Section 233 (8) of the Children's Act.

withdraw consent within a specified time frame serves to remedy ‘situations where free and informed consents were not given in the first place.’⁴⁶⁷

The Children’s Act also recognizes the potential risk of exposing children to child trafficking and other illicit activities if consent is not given freely. Therefore, it explicitly prohibits and criminalizes the inducement of a person to give up a child for adoption.⁴⁶⁸

Protecting families from improper inducement through the ‘no initial contact’ rule is one of the protective measures put in place by the Hague Convention to prevent child trafficking and other illicit activities. There is, however, no provision in the Children’s Act which embodies the ‘no initial contact rule’ as required by the Hague Convention.

In Ghana, the Children’s Act also contains provisions addressing consent to an adoption. The requirement is that the consent must be given by the parents or guardian of the child to be given unless the parent or guardian has persistently neglected the child, or is incapable of consenting to the adoption.⁴⁶⁹ The Court may also require the consent of any person who has rights in respect of the child under a court order⁴⁷⁰ or the consent of the spouse if the applicant is married.⁴⁷¹

Furthermore, before the Court grants an adoption order, it has to be satisfied that the relevant consents have been obtained and that every person who has consented to the adoption ‘understands that the effect of the adoption order will mean permanent deprivation of parental rights.’⁴⁷² Although the Children’s Act deserves much credit for recognizing the importance of obtaining consent to an adoption, there is no provision in the Children’s Act for persons giving their consent to undergo counseling prior to consenting to an adoption to ensure that free and informed consent is obtained. This clearly works against the spirit of international and regional standards. Furthermore, the Children’s Act does not put in place a time frame within which consent to an adoption

⁴⁶⁷ Mezmur (n29 above) 17.

⁴⁶⁸ Section 249 (1) (b) and Section 305 (1) (b) of the Children’s Act.

⁴⁶⁹ Section 68 (1) and (2) of the Children’s Act.

⁴⁷⁰ Section 69 (1) of the Children’s Act.

⁴⁷¹ Section 69 (2) of the Children’s Act.

⁴⁷² Section 70 (1) (a) of the Children’s Act.

may be withdrawn. The Children's Act also fails to put in place safeguards to suppress improper inducement in obtaining consents to relinquish a child for adoption such as civil or criminal penalties or protection of families through the 'no initial contact rule.'

The Children's Act also attaches importance on the views and consent of the child to an adoption. Section 70 of the Children's Act requires the consent of a child who is at least 14 years of age to be given.⁴⁷³ Furthermore, before the Court grants an order for adoption, it has to be satisfied that the child has consented to the adoption.⁴⁷⁴ The CRC,⁴⁷⁵ ACRWC⁴⁷⁶ and the Hague Convention⁴⁷⁷ require the views of the child to be taken into consideration in accordance with their age and level of maturity. Section 70 of the Children's Act fails to adequately implement this obligation by specifying the age at which a child's views and consent to an adoption may be given. This means that children below the age of 14 years who are mature enough to understand the implications of giving their consent are excluded.

4.4.3.2 Preventing improper financial gain

The financial aspects of intercountry adoption encourage exploitation of children for improper financial gain. In order to prevent improper financial gain in the context of adoption, it is necessary to control and regulate the financial aspects of intercountry adoption.⁴⁷⁸ According to Section 259 (3) of the South African Children's Act, accredited child protection organizations may only receive the prescribed fees and payments in respect of intercountry adoptions.⁴⁷⁹ Such organizations are further mandated to 'annually submit audited financial statements to the Central Authority of the fees received and the payments made.'⁴⁸⁰

The State also regulates the fees paid to accredited organizations in respect of intercountry adoptions through the Regulations. For instance, in terms of Regulation

⁴⁷³ Section 70 (1) (b) and (c) of the Children's Act.

⁴⁷⁴ Section 70 (1) (b) and (c) of the Children's Act.

⁴⁷⁵ Article 12 of the CRC.

⁴⁷⁶ Article 7 of the ACRWC.

⁴⁷⁷ Article 4 (d) of the Hague Convention.

⁴⁷⁸ Permanent Bureau (n223 above) 36.

⁴⁷⁹ Section 259 (3) (a) of the Children's Act.

⁴⁸⁰ Section 259 (3) (b) of the Children's Act.

107, accredited organizations may only charge R250.00 per hour for interview and counseling services and R170.00 per hour in respect of administration costs. However, such fees are subject to annual review.⁴⁸¹

In order to further prevent the adoption of children for financial gain, the Children's Act explicitly makes it unlawful to 'give or receive, or agree to give or receive, any consideration, in cash or in kind, for the adoption of a child.'⁴⁸² Any person who contravenes this provision is guilty of an offence.⁴⁸³ This is a powerful tool to deter improper financial gain. However, the prohibition does not apply to professional fees for services rendered by lawyers and psychologists,⁴⁸⁴ prescribed fees of the Central Authority⁴⁸⁵ and accredited child protection organization,⁴⁸⁶ organ of the state⁴⁸⁷ and any other prescribed person.⁴⁸⁸ Furthermore, the prohibition does not apply to compensation made to the biological mother in respect of reasonable expenses incurred in connection with the 'pregnancy, birth of the child and follow-up treatment,'⁴⁸⁹ counseling fees⁴⁹⁰ and other prescribed fees.⁴⁹¹ Although the Children's Act allows compensation to be made to the birth mother, it does not regulate the payments made or define what constitutes 'reasonable expenses' to prevent improper inducement. This absence creates avenues for improper inducement and solicitation of the birth mother to relinquish her child for the purposes of adoption.

The Guide to Good Practice has also raised concerns regarding compensating the biological mother for expenses incurred during and after the pregnancy arguing that 'allowing any reimbursement may lead to difficulties in determining whether a family has been induced to place their child for adoption.'⁴⁹² In order to prevent abuses, the

⁴⁸¹ Regulation 107 of the Children's Act.

⁴⁸² Section 249 (1) (a) of the Children's Act.

⁴⁸³ Section 305 (1) (b) of the Children's Act.

⁴⁸⁴ Section 249 (2) (b) of the Children's Act.

⁴⁸⁵ Section 249 (2) (c) of the Children's Act.

⁴⁸⁶ Section 249 (2) (d) and (e) of the Children's Act.

⁴⁸⁷ Section 249 (2) (f) of the Children's Act.

⁴⁸⁸ Section 249 (2) (g) of the Children's Act.

⁴⁸⁹ Section 249 (2) (a) (i) of the Children's Act.

⁴⁹⁰ Section 249 (2) (a) (ii) of the Children's Act.

⁴⁹¹ Section 249 (2) (a) (iii) of the Children's Act.

⁴⁹² Permanent Bureau (n223 above) 36.

legislature should ensure that payments made to the biological mother in respect of medical and other expenses incurred are strictly regulated to prevent improper inducement.⁴⁹³

The Children's Act of Ghana also contains provisions which address improper financial gain. According to Section 70, before the Court grants an adoption order, it has to be satisfied that 'the applicant has not received or agreed to receive any payment and that no person has made or agreed to make any payment or given or agreed to give any reward to the applicant for the adoption except such as the court may order.'⁴⁹⁴ Furthermore, the Children's Act explicitly prohibits giving or receiving any payment in respect of an adoption⁴⁹⁵ and uses civil penalties to suppress such illicit activities.⁴⁹⁶ However, there is no provision which regulates the financial aspects of intercountry adoption to prevent improper financial gain. It is submitted that the failure to regulate the financial aspects has the potential to open doors for illicit activities for the purposes of financial gain.

4.4.3.3 Bilateral or Multilateral arrangements/agreements

Co-operation between States is of paramount importance in preventing and combating abuses and ensuring the protection of children when they are adopted internationally. Accordingly, the Children's Act of South Africa makes provision for a system of co-operation between South Africa and other states in adoption matters. In terms of Section 255, the President may enter into an agreement with a non-Convention⁴⁹⁷ or Convention foreign state⁴⁹⁸ to the Hague Convention concerning intercountry adoption placement. However, such agreements should be in compliance with the requirements of the Hague Convention.⁴⁹⁹ It is commendable that the Children's Act extends the standards of the Hague Convention to non-Convention foreign states. This serves to ensure that all

⁴⁹³ Ibid.

⁴⁹⁴ Section 70 (1) (d) of the Children's Act.

⁴⁹⁵ Section 83 (1) and (2) of the Children's Act.

⁴⁹⁶ For instance Section 83 (3) of the Children's Act provides that 'any person who contravenes this provision commits an offence and is liable on summary conviction to a fine not exceeding c2 million or to a term of imprisonment not exceeding one year or to both.'

⁴⁹⁷ Section 255 (1) (a) of the Children's Act.

⁴⁹⁸ Section 255 (1) (b) of the Children's Act.

⁴⁹⁹ Section 255 (2) of the Hague Convention.

children who are involved in intercountry adoption enjoy equal rights and protection whether or not they are from a Convention on non-Convention state.

The Children's Act of Ghana is silent on the conclusion of bilateral and multilateral agreements with other states in adoption matters.

4.4.3.4 Interim orders

The provisions of Section 73 of the Children's Act of Ghana seem to provide safeguards for adopted children. It provides that 'in an application for adoption by an applicant who is not a citizen of Ghana or where there is a joint application and one applicant is not a citizen of Ghana, the court shall make an interim order for a period of not less than two years and shall postpone the determination of the application.'⁵⁰⁰ Thus, if the child remains in Ghana for the two year period, the DSW can monitor and supervise the well-being of the child and the child's relationship with the prospective adoptive parent before making a final order.

In South Africa, there is no requirement for interim orders to be made before an adoption order is granted.

4.4.4 The right to a name, identity and registration

The CRC and the ACRWC recognize the importance of a child to be registered immediately after birth. This is due to the fact that 'children who do not legally exist are vulnerable to illegal acts in intercountry adoption.'⁵⁰¹ The Births and Deaths Registration Act of South Africa⁵⁰² provides for the compulsory registration of births within a period of seven days.⁵⁰³ Furthermore, after the adoption of a child, the Births register is altered to reflect the 'adoption and change of surname of the child.'⁵⁰⁴ This helps in protecting children from illegal adoptions and child trafficking. In Ghana, the Registration of Births and Deaths Act contains a similar requirement.⁵⁰⁵

⁵⁰⁰ Section 73 of the Children's Act.

⁵⁰¹ UNICEF (n11 above) 8.

⁵⁰² Act No. 51 of 1992, Births and Deaths Registration Act.

⁵⁰³ Section 9 of the Births and Deaths Registration Act.

⁵⁰⁴ Section 245 of the Children's Act.

⁵⁰⁵ Act No. 301 of 1965, The Registration of Births and Deaths Act.

4.5 Conclusion

This chapter has analyzed the legislative framework regulating intercountry adoption in South Africa and Ghana. It has been shown that the Children's Act of South Africa (read with the Regulations) adequately regulates the practice of intercountry adoption. It provides sufficient procedures and safeguards for children when they are adopted internationally in line with the international standards. The Children's Act ensures that the best interests of the child are upheld throughout the adoption and it addresses the adoptability of a child and the subsidiarity principle in a comprehensive manner. This is of paramount importance in protecting the best interests of the child and preventing illicit activities. The Children's Act also makes provision for persons giving their consent to undergo mandatory counseling prior to giving their consent to ensure that free and informed consent is obtained.

Furthermore the Children's Act controls and regulates the financial aspects of intercountry adoption to prevent improper financial gain and it makes provision for the conclusion of bilateral and multilateral agreements. More importantly, the Children's Act provides for the establishment of a Central Authority to co-ordinate and oversee intercountry adoption and for the Accreditation of bodies as required by the Hague Convention.

However, the Children's Act is not without weaknesses. It fails to protect families from improper inducement by addressing the 'no initial contact' rule as required by the Hague Convention. It also fails to regulate the payments made to the birth mother in respect of medical and other expenses incurred to ensure that there is no inducement to relinquish a child for adoption. Measures to monitor the well-being of the adopted child are also lacking. These flaws in the Children's Act expose children to trafficking and other illicit activities which the international and regional instruments seek to eliminate.

The chapter has also shown that the Children's Act of Ghana is lacking in providing for intercountry adoption. As the only legislative enactment regulating the adoption of children in Ghana, the Children's Act should address intercountry adoption in a comprehensive manner and safeguard the rights of children. The Children's Act fails to put in place clear procedural requirements for intercountry adoption. There are no

guiding rules to assist the DSW in the placement of children internationally. It also lacks provisions on counseling prior to consenting to an adoption to ensure that free and informed consent is obtained and measures to monitor the placement of a child.

Furthermore, the Children's Act does not address the subsidiarity principle in a comprehensive manner or regulate the financial aspects of intercountry adoption to prevent improper financial gain. There is also no provision in the Children's Act requiring the conclusion of bilateral and multilateral agreements as required by the international and regional standards to prevent illicit activities. More importantly, the Children's Act does not require the establishment of a Central Authority to co-ordinate and supervise intercountry adoption. Generally, the Children's Act fails to effectively protect children when they are adopted internationally. While appreciating some of the measures put in place to protect the best interests of the child such as the age and residency requirements as well as interim orders, these measures alone are not sufficient to protect children when they are adopted internationally.

These legislative gaps and loopholes have the potential to open doors to trafficking in children and other illicit activities. The Children's Act therefore needs to be urgently reviewed and brought in conformity with the international and regional standards.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

What once emerged as a ‘humanitarian act’ to save the lives of children orphaned and separated from their parents as a result of the war has developed into a supply and demand driven industry for childless parents in desperate need of a family.⁵⁰⁶ This has resulted in different views between those who oppose and support the practice with opponents citing the irreparable damage to a child who is denied his/her cultural identity and the risk of exposing children to child trafficking and other illicit activities and proponents arguing that intercountry adoption fulfills the child’s right to grow up in a family environment filled with love and happiness.

Presently, the demand for children in the Western and industrialized countries has been satisfied with the supply of children from the African continent where there is a high population of orphans and abandoned children.⁵⁰⁷ This has resulted in the labeling of the African continent as ‘the new frontier for intercountry adoption.’⁵⁰⁸ To date, the high demand for African children continues to increase. This has attracted adoption agencies which are motivated by financial gain without any due regard for the best interests of the child. The increasing demand for African children coupled with the absence of adequate legislation and administrative structures has opened doors to child trafficking and other illicit activities which violate the best interests of the child. The absence of adequate legislation in many African countries such as Ghana, Togo and Liberia has created a climate that is conducive to child trafficking and other system abuses. Because of the financial aspects involved in intercountry adoption, children have become ‘commodities’ which are ‘sold to the highest bidder’ for financial gain without any respect for their rights.⁵⁰⁹

In light of the foregoing, the aim of this thesis has been to assess the fundamental principles that should underpin the practice of intercountry adoption and how it can be

⁵⁰⁶ Martin (n61 above) 177.

⁵⁰⁷ Ibid.

⁵⁰⁸ African Child Policy Forum (n15 above) 6.

⁵⁰⁹ Wilken (n48 above) 87-88.

regulated in a manner that protects the best interests of the child. The thesis also sought to examine how South Africa and Ghana regulate intercountry adoption and if the legislative framework regulating intercountry adoption in these two countries is in conformity with the international and regional standards. In order to achieve this goal, the first task was to examine the international and regional legal framework regulating intercountry adoption with a specific focus on the Declaration on Foster Placement and Adoption, CRC, ACRWC and the Hague Convention. It has been shown that these instruments lay down the principles and standards requiring the best interests of the child principle to be the guiding principle in decisions affecting the adoption of children and to be sanctioned by Competent/Central Authorities. These instruments also require intercountry adoption to be considered as a last resort if the child cannot be cared for in the country of origin and to ensure that children placed for intercountry adoption enjoy the same safeguards and standards as those in national adoption. Other principles and standards embodied in these instruments are to prevent improper financial gain, to conclude bilateral and multilateral agreements and to put in place measures to monitor the placement of a child. Finally, Member States are required to make birth registration compulsory in order to protect children from child trafficking and other illicit activities.

In chapter four, the legislative framework regulating intercountry adoption in South Africa and Ghana was critically analyzed. It has been shown that the Children's Act of South Africa provides sufficient procedures and safeguards for intercountry adoption. However, the Children's Act is silent on the 'no initial contact' rule as required by the international standards and mechanisms for post adoption follow up. There are also no provisions regulating the payments made to the birth mother to ensure that there is no improper inducement.

The chapter also analyzed the Children's Act of Ghana. It has been shown that the Children's Act is lacking in providing for intercountry adoption. It does not require the establishment of a Central Authority or accreditation of bodies to carry out intercountry adoption as required by the international standards. Furthermore, it does not address issues relating to counseling, post adoption follow up and the conclusion of bilateral and

multilateral agreements to protect children from trafficking. These legislative gaps expose children to child trafficking and other illicit activities.

This Chapter therefore presents suggested reforms/recommendations which the author thinks may assist in protecting the best interests of the child and addressing illicit activities in intercountry adoption.

- The first recommendation is for Ghana to be a Contracting State to the Hague Convention since it embodies a number of safeguards intended to protect children's rights and prevent illicit activities. This option is explicitly recommended by the CRC Committee, the African Committee of Experts on the Rights and Welfare of the Child including child rights organizations such as UNICEF as alluded to in chapter one. There is no doubt that the ratification and domestication of the Hague Convention in its national laws would enable a system of co-operation and co-ordination between Ghana and other Contracting States to the Hague Convention. This would help to eliminate some of the problems and dangers associated with intercountry adoption such as child trafficking and abduction.
- The second recommendation is for Ghana to establish a Central Authority to monitor, co-ordinate and supervise the placement of children internationally. Although Ghana is not a Contracting State to the Hague Convention, the CRC Committee has recommended the establishment of this crucial body to ensure that intercountry adoption takes place in the best interests of the child. The system of co-operation and communication between Ghana and other Central Authorities would play a pivotal role in ensuring that a child is matched with suitable adoptive parents, preventing improper financial gain in the context of adoption, ensuring that proper consents have been obtained and eliminating illicit activities which violate the best interests of the child.
- As alluded to in chapter four, the Children's Act of Ghana fails to effectively regulate intercountry adoption in accordance with the international and regional

standards. This exposes children to child trafficking and other abuses. Children in countries where the legislative framework is plagued with gaps are at risk of illicit activities. There is therefore an urgent need for a comprehensive review of the Children's Act. This can be achieved through the incorporation of the international and regional instruments which regulate intercountry adoption into the domestic laws to ensure that they reflect the international and regional standards.

- The ACRWC Committee should also play an active role in ensuring that the rights of African children are protected in adoption matters. It should require African States that allow intercountry adoption to provide comprehensive information on the legislative and other measures taken to implement Article 24 of the ACRWC which deals with intercountry adoption on the African continent.
- Finally, it is recommended that South Africa regulate the payments made to the birth mother in respect of reasonable expenses incurred to prevent improper inducement. Measures should also be put in place to monitor the placement of an adopted child to ensure that the adoption does not result in child trafficking. There is also need to address the 'no initial contact' rule as required by the Hague Convention to protect families from improper inducement to relinquish a child for adoption.

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